

228 9/8

OBSERVATIONS
CONCERNING THE
PUBLIC LAW,
AND THE
CONSTITUTIONAL HISTORY
OF
SCOTLAND:
WITH
OCCASIONAL REMARKS
CONCERNING
ENGLISH ANTIQUITY.

By GILBERT STUART, LL. D.

_____ Iaceto per ignes
Suppositos cineri doloso. Hor.

EDINBURGH.
Printed for WILLIAM CREECH;
AND
J. MURRAY, LONDON.
M DCC LXXIX.

OBSEKVATIONS

TO THE

CONSTITUTION

PUBLISHED

J. O. H. N.

CONSTITUTIONAL HISTORY

OF THE

SCOTTISH

OF THE

ENGLISH

OF THE



OF THE

OF THE

OF THE

OF THE

TO THE
RIGHT HONOURABLE,
J O H N,
LORD MOUNT-STUART,
BARON CARDIFF.

MY LORD,

I Do myself the Honour to present to your Lordship a Performance concerning the Laws and the Government of Scotland; and, on this Occasion, I might draw, with ease, from our History, many a delicate and fruitful Topic of Panegyric.

But I intend this Address as a Tribute of Respect, not as a Monument of Servility. I am not to speak of the Splendours of your
a 2 House

House and of your Name. My Attention is attracted by Qualities that are independent of Ancestry and of Fortune. I appeal to you as a complete Judge of the important and interesting Subjects into which I have presumed to inquire. I venerate your exquisite Knowledge in the History and the Constitution of the Scottish Nation. And, I am ambitious to applaud the Patriotism and Ability with which you have exerted yourself to promote its Dignity and Honours.

While my Admiration, however, is called to the Talents which become the Statesman and the Legislator, I am conscious of the Influence of those amiable Virtues which you have the Happiness to unite to them, and which are the Objects of Esteem. The former

mer

DEDICATION.

v

*mer give to Nobility and to Public Station
their Utilities and their Glory. The latter
are the Delight and the Ornaments of pri-
vate Life.*

I am, with the most profound Respect,

My LORD,

Your Lordship's

Most humble, and

Most obedient Servant,

GILBERT STUART.

DECLARATION

My name is [Name] and I am [Age] years old.

I am a [Nationality] and I was born on [Date] at [Place].

I am currently residing at [Address].

I am a [Occupation] and I have been working for [Company] since [Year].

I am a [Religion] and I believe in [Belief].

I am a [Marital Status] and I have [Number] children.

I am a [Citizenship] and I have been a citizen since [Year].

I am a [Residence] and I have been a resident since [Year].

I am a [Income] and I have an annual income of [Amount].

I am a [Assets] and I have assets worth [Amount].

I am a [Liabilities] and I have liabilities worth [Amount].

I am a [Debt] and I have a debt of [Amount].

I am a [Credit] and I have a credit of [Amount].

I am a [Savings] and I have savings of [Amount].

I am a [Investment] and I have an investment of [Amount].

I am a [Retirement] and I have a retirement of [Amount].

I am a [Estate] and I have an estate of [Amount].

P R E F A C E.

DURING the middle times, the laws and customs of Scotland are imperfectly understood ; and, on this account, the system of its jurisprudence is involved in uncertainty, and without that stability of principles which ought to distinguish it. When we know our public law, and our constitution, in their first rudeness, and in their progressive conditions of refinement, we shall be able to dispel this uncertainty, and to arrive at simplicity and science.

To contribute to a purpose so valuable, is the intention of this work ; and, while I endeavour to excite curiosity, I am studi-

ous to gratify it. But, the enterprize to which I point, will require the fostering cares, and the patient efforts of many a laborious scholar. An infinite multitude of materials and records must be collected, and a thousand painful researches must be made, before our jurisprudence is to ripen to perfection. The mine abounds in riches; but they are hid in the ground, and must be sought for with ingenuity and toil.

Though the labyrinth deceives with its windings, though dangers threaten on every side, it is not fit that we should lose our courage. It ought not to be any longer a reproach to the Scottish nation, that they are yet, in a great measure, to explore the principles and antiquities of their legislation and government. While I take the liberty,

liberty, therefore, to propose these important branches of inquiry to our lawyers, and men of letters, I cannot but urge even the difficulties which attend them, as incitements to activity and pride. They are exactly in that state of imperfection and neglect, where the most ample scope is afforded for the exertion of abilities, and for discovery. To go to subjects, which human wit has exhausted, is to court an inferior merit. It is to solace in an elegant idleness. It is to give up the praise of invention for tricks of rhetoric, and trappings of language.

Concerning the observations which I now submit to the public, it does not become me to offer an opinion. My execution

x P R E F A C E.

tion may be extremely defective ; but, I have a title to say, that my intentions were what they ought to have been. I felt the affections and the ardour of a good citizen. If my general principles are right, their application will be allowed to be extensive ; and my book, of consequence, must have a value. If I have fallen into errors, I shall be proud to forsake them. For, my view is to investigate the truth, and to illustrate a portion of knowledge, the most difficult. I affect not popularity and declamation. What I have written is to the few, and not to the many. And, to my topics, though they are of high import, no powers of mind can communicate the charm of uniform elegance, or the regular warmth of animated composition. It has
been

P R E F A C E. xi

been my wish, that my expression should be plain, without being negligent; and, contented with perspicuity, I did not seek for ornament.

2 R E F A C E

on my wife, that my expression should
plain, without being negligent; and
intended with perspicuity. I did not feel

it necessary.

C O N T E N T S.

C H A P T E R I.

THE general Importance of the Feudal Law. Its peculiar Obscurity in Scotland. The Notion that it was adopted by different Nations from a Principle of Imitation. Its uniform and distant Source. The Æra of its Introduction into Scotland. Common Opinions on this Subject. An Argument for the high Antiquity of Fiefs. Page 1

C H A P T E R II.

The Feudal Army. The National Militia. Their Variations and History. p. 13

S E C T I O N I.

The Growth of the Feudal Grant. The Military Service of the Vassal, while Fiefs were in their Progress. Knight-service. Its Duties. The Æra of its Establishment. The Conditions of Liberty and Servitude. Allodality. A Distinction on this Subject. The Military Schemes. Ordinances for the Advancement of Arms. ib.

S E C.

SECTION II.

The Decline of the Military Power. Causes of its Weakness. Remedies for its Recovery. The People maintain the Military Character, amidst the Decay of the Military Arrangements. An attempt to introduce a Standing Army. The Military Establishments of Scotland go to Ruin. Its present Condition as to Arms. Its Claim to a Militia.

Page 29

CHAPTER III.

The Revenue of the Sovereign, and the Expences of Government.

p. 41

SECTION I.

The Demesnes of the Crown. The Gifts of Subjects to the Prince. An Enumeration of different Branches of Revenue. The Care bestowed on the Royal Property. Resumptions of Royal Lands and Grants; and Annexations of new Wealth to the Crown. A general Conclusion concerning the Revenue of the Sovereign.

ib

SECTION II.

The Expence of Government in distinction from the Revenue of the Prince. The great Source of both.

Inno.

C O N T E N T S.

xv

Innovations with respect to them. The Sovereign finds himself in a critical Situation. The Spirit of Feudality gives way to that of Money and Commerce. The Aid for the Prince. The Aid for the Nation. Taxations on the Foundation of the Prerogative. Parliamentary Taxations. Extents, or Valuations of Lands. The old Extent. The new Extent. The valued Rent. Page 56

C H A P T E R IV.

Jurisdiction and Courts,

p. 72

S E C T I O N I.

The King's Palace and Court. The Members of the King's Court. The Officers of the Crown. The Chancellor. The Justicier. The Chamberlain. The Seneschal, or the Steward. The Conitible and the Marechal. The Influence and Luitre given by them to the Crown, and by the Tenants in Capite. p. 72.

S E C T I O N II.

The State and Jurisdiction of the Nobles. The Baron, the Earl. Palatinates or Regalities. The Courts of Tenants in Capite of the Crown; and of the Tenants of a Subject-superior. The Possessors of single

single Fees ; and the Possessors of the Members of a Fee. The Subordination of Jurisdiction. Page 83

S E C T I O N III.

The Decline of the Feudal Jurisdiction. The Origin of the Sheriff. The Advancement of his Powers. The Humiliation of the Nobles in their Judicative Capacity. The Fall of Regalities. The Shock of inferior Judicatures. The Confusions which thence arise. The King's Court is affected. Its Fall. The Rise of Regular Courts. The Privy Council. The Court of Session. The Court of Justiciary. The Court of Exchequer. The Destinies of the Seneschal or High Steward, the Constable, and the Marshal.

p. 92

C H A P T E R V.

The National Council. The mixed Form of Government. The Parliament of Scotland. The three Estates of the Realm. Barons by Tenure, by Writ, and by Patent. Earls by Tenure, and by Creation. The Peerage ceases to be Territorial. Tenants in Capite by Knight-service. The Origin of the Knights of the Shire. The Boroughs. Distinctions in the History of Towns. Their Representation. Enumeration of the Branches of the Legislature. The Lords of the Articles.

p. 109

CHAP.

C O N T E N T S. xvii

C H A P T E R VI.

The Union of the Crowns of England and Scotland.
Its Political Consequences. The Decline of Liberty in the Scottish Constitution. The Spirit of Government till the Revolution. The Advantages of the Revolution. The Union of the two Kingdoms. The British Constitution. The Heritable Jurisdictions. The Abolition of Fiefs.
Page 132

Proofs, Illustrations, and Controversy.

N O T E I.

Opinions concerning the Introduction of the Feudal Law into Scotland. p. 149

N O T E II.

The perpetuity of the Fief. Knight-service. The Knight's Fee. p. 156

N O T E III.

A Distinction concerning Allodality, and its Subjection to Military Service p. 163

N O T E IV.

The Introduction of Fire-arms into Scotland. p. 166

b

NOTE

NOTE V.

The Scots Guards, and the Scots Gendarmes. p. 170

NOTE VI.

The Idea that the Princes of Scotland were Indigent.
p. 175

NOTE VII.

The meaning of Parliament in Resumptions of Royal Property. The Notion that the Scottish Princes, from Robert Bruce to James V. had been engaged in particular Designs to depress the Authority of the Nobles.
p. 182

NOTE VIII.

Possessions of the Scottish Kings in England. The Usage of Corodies.
p. 190

NOTE IX.

Extents. Taxes.
p. 201

NOTE X.

The Leges Malcolmi.
p. 207

NOTE XI.

A Misconception concerning the Jurisdiction of the Sovereign.
p. 210

NOTE

C O N T E N T S. xix

N O T E XII.

An Idea of Baronial Magnificence. page 216

N O T E XIII.

An imperfect Theory concerning the Rise of the
Jurisdiction of the Nobles. Thanes. Thane-land.
p. 220

N O T E XIV.

The supposed Pre-eminence of the Scottish Aristocracy.
p. 225

N O T E XV.

The Prerogative of Private War. Compositions for
Offences. The Pleas of the Crown. Lawburrows.
The slow Progress of Jurisprudence. p. 243.

N O T E XVI.

The Vavaffor. p. 254

N O T E XVII.

Fractions of the Fee. The Multiplicity of Little
Manours. Scottish Lairds. And the Portioners of
Land p. 259

NOTE

N O T E XVIII.

The Sheriff. p. 262

N O T E XIX.

The immeasurable Power of the Chief Justicier.
The Nobile Officium of the Court of Session. p. 265

N O T E XX.

The Torture. p. 278

N O T E XXI.

The King's Court, and the National Council, or the
Parliament. p. 282

N O T E XXII.

Titles of Honour. p. 286

N O T E XXIII.

The Knight's Fee, a Parliamentary Qualification.
p. 288

N O T E XXIV.

The Distinction of the Greater and the Lesser Barons.
p. 291

N O T E XXV.

The Knights or Commissioners of the Shire. p. 297

NOTE

C O N T E N T S. xii

N O T E XXVI.

Points of Honour, and Peculiarities of Rank. p. 306

N O T E XXVII.

Facts, Reasonings, and Conjectures, to illustrate the
History of Towns. p. 311

N O T E XXVIII.

The Antiquity of the Representation of the People.
The Principle of this Representation p. 328

N O T E XXIX.

The Lords of the Articles. The Freedom of the Scot-
tish Constitution. p. 345

A P P E N D I X.

No. I.

Charter from Malcolm IV. to Walter the Steward
of Scotland. p. 369

No. II.

An Extract from Domesday-Book. p. 372

No. III.

The Oath of a Knight. p. 375

No.

No. IV.

Pro Duce Britanniae de Theolonio non praestando.
Page 378.

No. V.

Carta Foundationis Coenob. de Dunfermelinge. p. 381

No. VI.

Indenture between Robert I. and his Subjects. p. 283

No. VII.

The Ordination or Statute made at Scone, on the
4th Day of April, in the third Year of Robert II.

P. 390

E R R A T A.

- P. 2. l. 9. from the top, for *incite* read *invite*.
P. 62. l. 5. from the bottom, for *was* read *were*.
P. 181. l. 1. from the bottom, for *Chapter III.* read
Chapter IV.
P. 227. l. 4. from the top, for *with respect of*, read
with respect to.
P. 252. l. 1. from the top, for *it is by a very gradual*
step, read *it is by very gradual steps*.

OBSERVATIONS
CONCERNING THE
PUBLIC LAW,
AND THE
CONSTITUTIONAL HISTORY
OF
SCOTLAND.

CHAPTER I.

*The general Importance of the Feudal Law.
Its peculiar Obscurity in Scotland. The
Notion that it was adopted by different
Nations from a Principle of Imitation.
Its uniform and distant Source. The Æra
of its Introduction into Scotland. Common
Opinions on this Subject. An Argument
for the high Antiquity of Fiefs.*

THE Beneficiary, or the Feudal Law,
is an object of great dignity in every
country of Europe. It operated power-
A fully

fully both on government and manners; and, without a due comprehension of this subject, we should attempt in vain to form an adequate judgment of ancient times. Men of genius and learning have, of consequence, made inquiries concerning institutions which, while they lead to such general utility, are of themselves sufficiently singular to incite an anxious research and curiosity. Yet, it will be allowed, that the system of fees, notwithstanding all which has been done in relation to it, is very far from being clear or obvious. It contains a store of antiquities, infinitely intricate, and almost inexhaustible.

In Scotland, the history of this law is still more obscure than in any other nation. To this imperfection, the melancholy condition of our records has contributed in an efficacious manner. But, I think, it is chiefly to be ascribed to our want of antiquaries

quaries of ability. For the progression of fiefs must have been nearly the same in all the kingdoms of Europe. No Selden, no Spelman has arisen, to cast a light upon the gloom which conceals our laws, government, and customs; and our historians have copied one another with a convenient and disgraceful servility.

An idea has prevailed, that one nation of Europe adopted the feudal institutions from another; and the similarities of fiefs in all the states where they were established, has given an air of plausibility to this opinion. It is contradicted, however, by the principles of natural reason, and by the nature of the feudal usages; and, if I am not mistaken, it receives no real sanction from records or history.

In the peculiarity of the manners, and of the situation of the barbarians who overran Europe, we must look for the source

of the beneficiary or the feudal constitutions. We meet with them uniformly, wherever this peculiarity prevailed. They did not flourish by adoption; they did not spread by imitation. They were prior to the æra when states attend to the usages of one another, and improve by observations from abroad. They were not the effect of a plan, or the creation of a projector. They unfolded themselves under the influence of human passions and human conduct, in a certain condition of society. Wherever they struck root, they rose up to a similar height, and in resembling proportions. In every country of Europe they kept a correspondence in their growth, maturity, and decline. Their principles, genius, and history, wherever we may go to observe them, have a general and a striking uniformity. And the variations which are to be seen in minute particulars, on a penetrating

penetrating survey, are to be explained from the events, the accident, and the policy which diversify nations.

The portrait, which suits the barbarians who made settlements in the other countries of Europe, will apply to the warriors who founded the kingdom of Scotland. They were distinguished by a passion for war, a love of independence, and a contempt of all the arts of peace. They were pleased with address, activity, and valour. Men of merit were surrounded with followers. With these they upheld their importance, and set barriers to despotism. The prince was respected, and was respectful in his turn.

A military sovereign, limited in his power, officers, who added to his greatness, while they supported their own, and soldiers who were conscious of freedom,

and disposed to maintain it, were to regulate the territory they had acquired. No record, no code goes back to this remote period. But, as the same causes will still be attended with the same consequences; the divisions which were made of the landed property, must have exhibited a resemblance to those which took effect among the other adventurers of Celtic and Gothic origin, who fixed themselves in their conquests.

The sovereign, as representing the public, gave out territory to the chiefs who were to guard his throne; and the chiefs bestowed possessions on their followers, who were to advance with them to battle. The ranks of the community had been united in a previous subordination. The superaddition of the tie of land, gave a stability to this union, and was immediately productive of superiority and vassalage.

But,

But, while possessions were to flow in the range of feudality, and were to uphold a regular militia, there were also estates, which were to be received, and to be retained under more enlarged maxims. To these, every person who was free had a title. He could lay claim to his lot or partition of territory, and could dispose of it at his pleasure. In contradistinction to the feudal grant, which was burdened with service, and confined by limitation, these lands were known by the name of *allodiality*; a term which denoted their entire freedom and exemption from superiority*.

These great divisions characterised the property of land in every country of Europe. In Scotland, they were coeval with the monarchy. And, they must have sprung from the same peculiarity of manners,

* Spelman, Gloss. voc. Alode.

ners, and of situation, which had given them existence in other nations*.

It has been conceived, indeed, that Malcolm II. building upon some foreign model, introduced these customs into Scotland; and the great body of the Scottish historians and lawyers have subscribed to this notion. It has likewise been thought, that they were imported into this country expressly from England; and the policy of Malcolm III. has been highly extolled, as the effective cause of their establishment †. But it seems to me, that no reasons of any authority support these opinions [A].

They bear either expressly, or by implication, that the feudal system was introduced into Scotland, in consequence of a principle of adoption or imitation. Now, the peculiarities of fiefs are so strong, and
so

* View of Society in Europe in its progress from rudeness to refinement; book I. chap. 2.

† Essays upon several subjects concerning British antiquities, Ess. I.

[A] NOTE I.

so contradictory to all the common maxims which govern men, that they could not possibly be carried, in any stage of their progression, from one people to another. To transplant the feudal usages, when the grants of land were precarious, or at the will of the prince, to a country where superiority and vassalage had been unknown; to alter the orders of men, from the sovereign to the peasant; and to produce the corresponding chain of customs, with respect to legislation, and the details of the higher and the lower jurisdiction, must have been an attempt infinitely wild, and altogether impracticable. To transplant fiefs in their condition of perpetuity, must have been a project, involving an equal, or rather a greater number of absurdities.

But, while it is to be imagined, that fiefs could not be transported with success, in any period of their progression, from one people to another; it is also obvious, that a nation so cultivated, as to have the
knowledge

knowledge and the practice of them in any degree, could not be inclined to make a conquest for the purpose of a settlement. The existence of fiefs implies an establishment and a fixed residence; and history has no notice of any tribe or people under this description, who ever wandered from home to fight for a tract of country which they might inhabit,

Wherever feudality was to flourish, it was to grow from the root. The tree could not be carried to a foreign soil. Its native earth could alone preserve it in existence, and give the aliment that was to make it rise into height, and shoot into branches.

Scotland was a feudal kingdom; and we can point pretty exactly to the time when fiefs were *hereditary* there. Now, in that form, they could not be imported by any of its princes; and, it is evident, that no
conquering

conquering nation, advanced to the practice of fiefs in this degree, made a conquest and establishment in Scotland. In consequence, therefore, of a *natural* progress, fiefs must have grown to this condition of refinement. And, before fiefs were hereditary, they were for a series of years; before they were for a series of years, they were for life; and, before they were for life, they had been precarious or at pleasure *.

In every feudal country, the progress from the precarious grant, to the gift in perpetuity, was experienced. In Scotland, the same progress must have been known; and the consideration of it carries us back to a remote antiquity. For fiefs, in this kingdom, being *hereditary* about the days of Malcolm II. or Malcolm III. some centuries must have passed away in the production of the previous steps of feudality.

It

* Lib. Feud. 1. tit. 1. Craig, Jus Feudale, lib. I. dieg. 4.

It was not, in fact, till the year 877, that, in France, the progress of fiefs to perpetuity was finished *. In England, hereditary fiefs were known before the time of Edward the Confessor, who began to reign in the year 1041. In Scotland, estates hereditary, or in perpetuity, are mentioned to have been familiar in the age of Malcolm II. who was crowned King in the year 1004; and a certainty of their existence is evinced in the reign of Malcolm III. who swayed the Scottish sceptre from the year 1057 to the year 1093 †.

These things, so natural, so consistent, and so uniform, appear to me to have an authority that is not to be controverted; and, I think, I am justified to infer from them the high antiquity of fiefs in the Scottish nation.

C H A P.

* View of society in Europe in its progress from rudeness to refinement, book II. ch. 2.

† Chron. Saxon. ap. Praefat. Episc. Derrensis ad LL. Anglo-Saxon. p. 6. 7.

C H A P T E R II.

The Feudal Army. The National Militia.
Their Variations and History.

S E C T I O N I.

The Growth of the Feudal Grant. The Military service of the Vassal, while Fiefs were in their Progress. Knight-service. Its duties. The Æra of its Establishment. The Conditions of Liberty and Servitude. Allodality. A Distinction on this Subject. The Military Schemes. Ordinations for the Advancement of Arms.

THE avidity of man to accumulate property, his real wants, his artificial desires, his love of pleasure, his ambition, his care to perpetuate his name, and
to

It was not, in fact, till the year 877, that, in France, the progress of fiefs to perpetuity was finished *. In England, hereditary fiefs were known before the time of Edward the Confessor, who began to reign in the year 1041. In Scotland, estates hereditary, or in perpetuity, are mentioned to have been familiar in the age of Malcolm II. who was crowned King in the year 1004; and a certainty of their existence is evinced in the reign of Malcolm III. who swayed the Scottish sceptre from the year 1057 to the year 1093 †.

These things, so natural, so consistent, and so uniform, appear to me to have an authority that is not to be controverted; and, I think, I am justified to infer from them the high antiquity of fiefs in the Scottish nation,

C H A P.

* View of society in Europe in its progress from rudeness to refinement, book II. ch. 2.

† Chron. Saxon. ap. Praefat. Episc. Derrensis ad LL. Anglo-Saxon. p. 6. 7.

C H A P T E R II.

The Feudal Army. The National Militia.
Their Variations and History.

S E C T I O N I.

The Growth of the Feudal Grant. The Military service of the Vassal, while Fiefs were in their Progress. Knight-service. Its duties. The Æra of its Establishment. The Conditions of Liberty and Servitude. Allodality. A Distinction on this Subject. The Military Schemes. Ordinations for the Advancement of Arms.

THE avidity of man to accumulate property, his real wants, his artificial desires, his love of pleasure, his ambition, his care to perpetuate his name, and
to

to enrich his posterity ; the generosity of his nature, and its selfishness ; all joined to advance the precarious fief to be hereditary. And, when the fief was hereditary, or perpetual, the feudal system was in its state of completion.

From the grant at pleasure, to the gift in perpetuity, some centuries are included ; and, during this long period, the feudal vassal was bound, by a *general* obligation, to military service. In the infancy of the union of the lord and the vassal, a general obligation only was sufficient. The service of the vassal, when demanded, was given with sincere pleasure, and entire cordiality. The bent of rude times was towards war, and there was an absence of all commercial objects. The vassal resorted to the hall of his superior, took a concern in his ambition, and mixed in his amusements and sports. An affectionate intercourse, and a reciprocation of good offices, seemed
to

to mark out the feudal association as a confederacy which could not be impaired, and which was destined to flourish.

But, as the uses of wealth were unfolded, the feudal grant was to become a subject of disquiet. In all the progress to hereditary fiefs, property was to rise in its advantages and security. It called the attention of the vassal from his lord to himself; and, amidst mercenary pursuits and occupations, the cordiality which had distinguished them of old, was to decay. Thus the military service, which had been brisk and vigorous in its early operations, came to languish with time, and the altering state of the feudal association. This change, or fluctuation, was experienced in Scotland, as well as in every other feudal kingdom; and here, too, the same remedy, or expedient, was applied to recover the militia of fiefs.

The

The military duty, which had been a general obligation only upon the vassal, was made *particular*. This invention was called *Knight-service*. The vassal, by this tenure, was bound to be in the field for forty days, with a known attendance of soldiers or knights. The number of these was in proportion to the extent of his fief. Rolls were kept of the military tenants, and of the exact services they were bound to perform. And, in this manner, the prince was instructed in the proper strength of his kingdom *.

Knight-service was established in Scotland before the time of Malcolm IV. †. Records of his reign instruct its existence, and do not mention it as a novelty [B]. It was a measure fancied with address; and it

* View of society in Europe in its progress from rudeness to refinement, book 2.

† He began to reign an. 1153.

[B] NOTE II.

it communicated to the feudal militia all the utility of which it was capable.

But, while the vassals of the crown, with their followers or knights, were to fight for the kingdom, we must not imagine that they were its only defenders. In every feudal state, the great conditions of society were liberty and servitude. To be free, was to have a title to go to the war, and to seek renown. To be a slave, was to be doomed to toil in the house, to sweat in the field, and to know neither ease nor glory. While the subordinations of men, in the arrangements of feudality, were the peculiar guardians of the kingdom, there was yet, in every person who was free, an inherent obligation to defend it against uncommon and urgent dangers. The necessities of the state gave the alarm to all the ranks of the citizens; and the brave made haste to repel the enemy, and to spill their blood.

B

There

There were thus the militia of fiefs, and the militia of the nation.

Of the free, it was a characteristic, that they might possess property; and, while the train of the vassalage filled up the feudal army, the militia of the nation was necessarily to consist of the proprietors of *allodiality*. But though, in general, an allodial possession is to be applied to a property in land, it was likewise to denote an estate in moveables, or in money; and proprietors of the latter class, as well as those of the former, were, in the seasons of peril, to bear arms, and to range themselves in battle [C].

These military schemes communicated to the Scottish monarchs a command, which included the fullest strength of the kingdom. Upon ordinary occasions, they marched with the military tenants; and, when

[C]. NOTE III.

when the nation was pressed to extremity, they might embody, without distinction, all their subjects who were capable of bearing arms.

That these ends might be pursued and answered, every feudal, and every allodial proprietor, was ordained to provide himself with armour in proportion to his estate. Musters of men, from the age of sixteen to sixty, were made. It was remarked by the feudal captains, and by commissioners appointed by the crown, that every individual had the arms which were suited to his wealth and to his station *.

When the sovereign issued his mandate to assemble the troops, all persons of whatever rank, were to present themselves in the army. The loss of his fief, or a fine in proportion to his quality, was the punishment of the disobedient vassal † : And

B 2 it

* Stat. Wilhelmi, cap. 23. Prima Stat. Rob. I. cap. 27.

† Stat. Alexandri, cap. 15.

it is to be conceived, that the allodial proprietor, or the foldier who was arrayed in the strength of his county, was also subjected to a penalty when he delayed or refused to advance to the royal standard.

The militia of the nation, as well as the militia of fiefs, served upon their own charge; and wherever the troops were to pass, it was a law, that provisions should be afforded to them at the prices which were usual. The magistracy of towns, and the bailiffs of villages, were to attend to their bargains and transactions with the people. On their march, they were discharged from committing any disorder or waste, and from all practices of fraud. And it was a rule, that the country should assist the soldiery, and that the soldiery should abstain from doing any injury to the country.

When the war was not distant, men of rank went to the camp, with the equipage
and

and garniture of their table. When the scene of action was remote, they were to carry along with them the fums of money which were to supply their necessities, and to operate to their grandeur *.

This was the military power of Scotland, when it maintained the struggle for independence against Edward I. ; when it recovered its liberties which had sunk under the strength and the craft of this conqueror ; when it chastised the vain temerity and restlessness of Edward II. ; and, when it contended anew for its freedom against the policy, the talents, and the valour of Edward III.

The rising ambition of Princes, and the superior force exerted in their contentions, was rendering war a greater object of attention. James I. a Prince of the most shining talents, knew how to distinguish himself,

himself, and enacted many laws for the advancement of arms. It was one of his regulations, that all men, from the age of twelve years, should employ themselves to excel in archery. Bow-marks, or butts, were erected in convenient places in every parish; and those who neglected to exercise themselves in shooting at them were to be fined by his sheriff, or by the lord of the territory *. He gave encouragement to merchants to import the weapons of war into his kingdom; and he commanded regular exhibitions to be made by the soldiery of their arms †. The proprietor, who had land of the extent or valuation of twenty pounds, or who possessed one hundred pounds of moveables, was to have a horse, and to be armed at all points. The proprietor

* Statutes James I. parl. 1424, cap. 18.

† Parl. 1424, cap. 44. parl. 1425, cap. 47. These exhibitions were called *weaponschawinges*. In France, this ceremony was *monstre d'armes*, *armorum ostensio*; *Du Cange*, voc. *Arma. Monstrum*. In England, it was termed the *arraying* of the troops, or the marshalling of them in military order.

proprietor who enjoyed a ten pound land, or fifty pounds in goods, was to have a hat, a gorget, gloves of plate, and defences of steel, for other parts of his body. Burgeses and proprietors who had twenty pounds in moveables, were to have a habergeon, or a doublet of defence, an iron hat, a bow, a case * of arrows, a sword, a buckler, and a knife. Men of inferior degree were to be armed to the best advantage, at the discretion of the sheriff. And those who had no bows, were to have a battle-ax, a target, a sword, and a durk †.

The barons and knights who had great estates, and who had obtained the King's license, might exceed in warlike accompaniments, and adorn themselves with silk

B 4

and

* It contained twenty-four arrows; *Skene, voc. Schaffa sagittarum.*

† Parl. 1425, cap. 60. parl. 1429, cap. 120. 121. 122. 123.

and fur. But, in general, it was ordained, that all soldiers, of whatever station, should avoid gaudiness and ornament, and array themselves in plain garments*.

These practices of discipline, and usages of war, were continued and improved under James II. under James III. under James IV. and under James V †. But the knowledge of powder and fire-arms being extended over Scotland in the reign of the last of these princes, the art of war was to change its operations. Hand-guns, culverings, and artillery of different kinds, came into fashion; and, with these, the officers and soldiery were to provide themselves, according to their stations, and the measure of their wealth.

* James I. parl. 1429, cap. 119.

† James II. parl. 1456, cap. 56. 64. James III. parl. 1471, cap. 45. Parl. 1481, cap. 81. Parl. 1483, cap. 90. James IV. parl. 1491, cap. 31. Parl. 1503, cap. 75. James V. parl. 1540, cap. 85. 86. 87. 88. 89. 90.

wealth. The barons and lords instructed their vassals in the use of them ; and captains chosen in every parish, by its magistrates, and the king's commissioners exercised the national militia. * [D].

In the reign of Queen Mary, the intercourse with France served to improve the Scottish nation in the knowledge and the practice of fire-arms. But James VI. who hated war, made no improvement of the military art. He constituted, however, a guard for his person, which was to consist of forty men, who, beside having goodly fortunes of their own, were each to be allowed two hundred pounds yearly for their entertainment and parade. They were to serve on horseback, and to be in a constant attendance †.

The

* James V. parl. 1540, cap. 91. 94.

[D]. NOTE IV.

† James VI. parl. 1584, cap. 137.

The engines of war approaching to perfection in France, Germany, and England, corresponded with the advancement of the arts. Scotland caught by communication the advantages of other states. The disastrous times of Charles I. agitating all the most violent passions, and all the bitterest animosities of men, fostered the military virtues, and made known that dependence of officers, that subordination of troops, and those forms of the military art, which still, in some measure, characterise the armies of Europe.

To Charles II. the estates of the Scottish parliament made an offer of twenty thousand foot, and two thousand horse, to be raised out of the different shires of the kingdom *. On the foundation of this grant, Charles, with the approbation of parliament, was to new-model the military power

* Car. II. parl. 1663, cap. 26.

power of Scotland. The enlistment of men was in the places and counties where they were usually to serve. Fit allowances were given to the foot and horse, in the times of rendezvous, and a care was bestowed to exercise them. In this constitutional militia, which was to act, and to be disbanded, according to events and circumstances, the nation was to confide, as in a bulwark; and it was to march at the command of the prince, to oppose every invasion from abroad, and to suppress all domestic insurrections*.

This establishment was meant as an effectual improvement of the former military schemes. And, from the reign of Charles II. till the union of the two kingdoms, it was the rule for raising those levies of horse and foot, which were rendered necessary by the exigencies of a present emergence.

* Car. II. parl. 1669, cap. 2.

emergence *. But, notwithstanding this military settlement, the sovereign had still the privilege to call out in arms, on momentous occasions, every man in the kingdom, from the age of sixteen to sixty †.

SECT.

* Acts of the estates of Scotland, an. 1689, cap. 20. 23. 24. Stat. Will. and Mary, parl. 1683, cap. 7. Will. parl. 1695, cap. 33. parl. 1696, cap. 23.

† Car. II. parl. 1663, cap. 26.

S E C T I O N II.

The Decline of the Military Power. Causes of its Weakness. Remedies for its Recovery. The People maintain the Military Character, amidst the Decay of the Military Arrangements. An Attempt to introduce a Standing Army. The Military Establishments of Scotland go to Ruin. Its present Condition, as to Arms. Its Claim to a Militia.

THE military power created by fiefs, and the national militia, constituted a strength which had acquired great glory over Europe. In Scotland, the renown of the former was as considerable as in any other kingdom. And here, too, it bore within its bosom those seeds of decline, which it carried every where beside; and its defects, and the inherent weakness of every

every militia, ought to have produced the advantage of a standing army, which, when guarded by proper restraints, will be allowed to be an instrument, the most effectual, both for protection and for conquest.

Knight-service, the tenure of feudality, which was invented to give stability to the military power of fiefs, could not operate to that end with a constant effort. Commercial ideas were altering the sentiments and the manners of men. The duties of feudal obedience were to shock the dignity of barons who were opulent and powerful; and the seduction of their example was to infuse a turbulent spirit into the lower orders of the vassalage. Jealousies without number were to distract the superior and his tenants. The claims of wardship and relief, of marriage, aid, and escheat, were to rise into oppressions. The action of the feudal system, when times were mercenary, and property the chief object of care, promoted

promoted divisions and selfishness; and, though this natural principle of disunion had not prevailed; yet, order and discipline could not be vigorous among troops, who were disbanded on the termination of an incursion or a battle.

The division of the *fee* into parts; the commutation of service for money, or for elusory prestations, for the presenting of a pair of spurs, or the blowing of a horn, at stated times, and on particular occasions; and the power of the vassal to act in the army by a deputy, were all circumstances which were about to be experienced; and of which, it was also the tendency to wound deeply the feudal association, and its military duties *. And these met with stabs more severe in the desires of the proprietor to dispose of his estate, and in the invention of the powers of sale and alienation ;
in

* Stat. 2. Rob. I. cap. 25. l. 2. 3. 4. 5. Stat. Wilhel. cap. 31. Du Cange gles. voc. *Sergentiae parvae*.

in the wishes of the creditor to procure what belonged to him, and in the invention of the privilege of distressing or attaching the property of the debtor, and of forcing it into commerce *.

It was in vain that princes attempted to uphold the feudal militia. Encouragements were given to arms; but their influence was only partial, and for a season. By a law framed with wisdom, and often renewed, the sovereign, when his vassal died in the field, or received a mortal wound, was to remit to the heir the expensive incidents of ward, relief, and marriage; and the nobility were to extend this advantage to the heirs of their tenants in a similar situation. With a like intention, it was ordained, that, when the unlanded soldier perished in the host, or was wounded to death, his wife and children should enjoy his
his

* Stat. Wilhel. cap. 13. 1. 2. Leg. Burg. cap. 23.
Stat. Alex. cap. 24. 1. 2. 4. 5. 6. 7.

his leases and possessions for five years without any fine of entry or compensation to the proprietor. And, when a churchman was slain in battle, or died of a sickness contracted in the camp, it was enacted, that his nearest relation of most approved ability, should be presented and collated to his benefice*.

But what laws could not do, was in some respect effected by the weakness of the country, and the rivalry it was proud to maintain with England. This peculiarity of condition kept alive its military ardour. It seemed that a free nation ought not to trust to mercenaries for protection and defence. Amidst the defects and the languor of their military arrangements, the people

C

felt

* James IV. parl. 1509, cap. 102. James V. Parl. 1522, cap. 3. 4. Q. Mary, parl. 1547, c. 4 5. 6. James VI. parl. 1571, cap. 41. 42. Will. and Mary, parl. 1690, cap. 37.

felt a confidence in themselves, and a sense of independence. Though they admitted, therefore, of the act of Charles II. as an useful regulation in the decline of the feudal army, and of the national militia, they had never any respect for troops at the command of the sovereign, in his pay, and established in times of peace as well as war.

The example of France had not allured the Scottish nation to be in love with a standing force. The glory, indeed, acquired in that kingdom by the Scots guards and the Scots gendarmes [E] had been infinitely flattering, and was strongly expressive of the superiority of bodies of men who could fight with art, as well as courage, and who being kept perpetually in discipline, were to consider war as their profession; and, of the power and grandeur which they might secure by similar establishments, the Scottish monarchs

[E] NOTE V.

monarchs could not be insensible. But they dreaded the pride of their nobles, and the fierce resentment of their people.

Mary of Guise alone, when Queen-regent, had the rashness to take a violent step towards a measure so odious, and to which the way ought to have been prepared by slow and wise precautions. It was proposed in parliament, that a survey of the property of the kingdom should be made; that a tax should be lifted from every person, in proportion to his wealth; and that this revenue going to support a standing guard for the frontiers, the nobility might remain in quiet in their castles, unless when the country was invaded by an uncommon and very formidable enemy. A permanent tax on land, and a mercenary army at the command of the crown, were too formidable to be listened to with moderation by the people. The disguise was too transparent to deceive. A generous

nation gave way to those emotions which lead to instant and determined action. Barons and freeholders, to the number of three hundred, carried their remonstrances to the Queen-regent, in that bold and aspiring language which becomes men who consider despotism as a greater evil than death. Terror succeeded to temerity; and a project, formed without thought, was abandoned with precipitation*.

Under the impulse of a high sense of liberty, the people of Scotland were not to degenerate from valour. Yet time was deepening the decline of its military schemes; and a knowledge in the art of war was to advance, while its establishments were to perish. The confusions of a system which could not agree with refinement and the arts, were to be insupportable, when the Revolution had extended its freedom

* Buchanan, *Rev. Scot. hist. lib. xiv.*

freedom and liberality of sentiment; and the union of the two kingdoms made the nobles to resign the few rights that remained to them of feudal importance. But, in the struggles of the two rebellions to support the House of Stuart, which followed these great events, a general disgrace was to be sustained by the Scottish nation itself. It was to be disarmed altogether. By their operation in connection with former causes, a termination was put to the feudal troops, and to every show of a national militia.

Such have been the fates of these establishments. Advantages were mixed with a necessary expression of displeasure. The standing army, which, after the union of the two kingdoms, became a part of the British constitution, communicated its dangers as well as its utilities to Scotland. The Scots serve in it, and add to its glory; but they now have the enjoyment of no other military power; and, if this army, in the course of melancholy convulsions,

were to march against them ; or if, finding full employment in another quarter, this army could not afford to them any protection against a common enemy, they would be found in a condition the most helpless. Scotland has no militia to defend it. The people, who ought to be their own protectors, are without arms.

Beside its regular troops, England has to boast its militia. This is the barrier to which it looks for the preservation of its liberties. This is the defence which the legislature itself has declared to be ‘ essentially necessary to its safety, peace, and ‘ prosperity *.’ To an establishment of this kind, Scotland has also a claim which cannot be controverted. The right of self-preservation, the freedom of the constitution, and the firm and liberal connection of the sister-states, are illustrative of this claim.

* 39. Geo. II. cap. 25. ap. Ruffhead, vol. viii. p. 80.

claim. The barrier, the defence possessed by the one, is not less 'essentially necessary to the safety, the peace, and the prosperity of the other.'

The advantage which Scotland lost was only for a time, and not for ever. The causes of a precaution which was once proper, are not always to endure. They will pass away; and the continuance of the precaution will then be not only unjust, but imprudent. The period approaches when even the venom and activity of faction shall not be able to excite any improper suspicion between the two nations. Jacobitism is retiring to seek obscurity and repose in its grave. The influence of clanship is almost utterly decayed. The most remote corners of Scotland have received the protection of laws, and the security of regular courts; and, at length, they understand the value of this condition. The chieftain is no longer a commander and a magistrate. He can
neither

neither terrify with his power, nor insult with his justice. The habits of rapine, and the consequent proneness to insurrection, have given way to the propensities of industry, and the love of peace.

CHAPTER

CHAPTER III.

The Revenue of the Sovereign, and the
Expences of Government.

SECTION I.

The Demefnes of the Crown. The Gifts of Subjects to the Prince. An Enumeration of different Branches of Revenue. The Care bestowed on the Royal Property. Resumptions of Royal Lands and Grants; and Annexations of new Wealth to the Crown. A general Conclusion concerning the Revenue of the Sovereign.

THE support and grandeur of the sovereign were a capital object of attention in every feudal state. The demefnes of the crown in Scotland, as in every other European monarchy, were in proportion

to the extent of the kingdom *. Originally, it is to be conceived they were fully sufficient for the royal necessities and splendour. And in the simple times which preceded the perpetuity of the fief, when extraordinary occasions presented themselves, the prince received effectual supplies of revenue from the benevolence and gifts of the vassals, and of the possessors of alloduality †. As society improved, and the fief became hereditary, his wants were to increase. It was expedient that his property should be greater. His claims acquired a solidity; and new sources of wealth were to be discovered.

By the rules of the feudal institutions, it was frequently to happen, that escheat, devolution, and forfeiture, were to send back to the prince the lands of the barons and vassals *in capite*; and, when these did not

* Spelman, gloss. voc. *Dominicum*. •

† Du Cange, gloss, voc. *Donum*. Spelman, voc. *Xenia*.

not go away from him in new grants, it was the practice to give them out in custody to farmers or sheriffs, who answered to the exchequer for their profits. Hereditary offices, with the possessions in connection with them, were returning also to the crown by similar methods, and were managed in a similar manner *.

The profits of wardships, reliefs, and marriages, were prodigious. The incident or perquisite of aid might be demanded by the sovereign when his eldest son was knighted, when his eldest daughter was married, and when he himself was ransomed. It might be demanded, though with less legality of claim, to relieve any other important or pressing necessity †.

A

* *Regiam Majestatem*, lib. 2. cap. 45. 55. *Quon. Attach.* cap. 19.

† *Reg. Maj.* lib. 2. cap. 71. 73. *Stat. Rob. III.* cap. 19. *Du Cange*, voc. *Auxilium*.

A revenue arose out of vacant bishopricks, out of monasteries of royal foundation, and out of the necessary jurisdiction of the prince in ecclesiastical affairs*.

The wreck of ships within the kingdom, royal fish, royal mines, waifs, estrays, treasure of which no person could claim the property, the custody of lunatics and of their lands, the goods of felons and convicts, were other branches of the riches of the crown †.

Fines or presents were made to the sovereign for liberties and privileges; and fees were exacted for grants and confirmations of offices and property. The profits which grew out of proceedings at law were valuable, and almost without end. Amerciaments for crimes and trespasses were extensive,

* Reg. Majest. lib. 2. cap. 23. Stat. 2. Rob. I. cap. 1.

† Quon. Attach. cap. 48. Reg. Majest. lib. 2. cap. 46. Stat. Alex. II. cap. 25.

tenfive, and generally arbitrary. Confifcations were frequent. Towns prefented great fums for particular favours and franchises. And various duties or customs were paid for different objects of merchandize, and for the exportation and importation of commodities *. [F].

An extenfive revenue was thus poffeffed by the Scottifh princes, and it failed not to maintain their political confideration. It was to fuffer at times from a pious liberality to the church, from a weak profufion to favourites, and from the difgraceful rapacity of ftatfmen. But it was at no period to be either contemptible or fcanty. The maxim, that the demefnes of the crown could

* Reg. Majeft. lib. 1. cap. 6 8. 18. 26. 27. lib 3. cap. 1. 24. 36. lib. 4. cap. 10. Quon. Attach. cap. 54. Stat. Rob. III. cap. 8. Leg. Burg. cap. 27 141. 142. Stat. Gild. cap. 41. Stat. David II. cap. 37. 49. Stat. Wilhel. cap. 36. Stat. James I. parl. 1. cap. 8. 21. 22. parl. 2. cap. 40 parl. 7. cap. 101.

[F] NOTE VI.

could not be alienated, though often infringed, was fostered more carefully in Scotland than in any other feudal state; and it was thought, that every improper donation or abstraction of the royal revenue, ought to be challenged and revoked.

Robert Bruce assembled a parliament for the purpose of re-annexing to the crown those fees and estates which in times of war and confusion had passed away from it. The possessors of crown-lands were called upon to produce their charters. Many of them had no charters to produce, and many were averse from all inquiries of this kind. A body of them acting in concert, drew their swords. 'Our swords,' said they, 'are the tenure by which we hold our estates, and with their points we will defend them.' The conspiracy which had been formed was detected. King Robert displayed his vigour and address. And to this mutinous ferocity, the black parliament,

parliament, consulting the authority of law and government, gave a necessary check by executions and forfeitures *.

James I. amidst the other important transactions of his reign, paid a proper attention to the royal demesnes and revenue. He ordained the sheriffs to inquire into the lands, possessions, and rents which pertained to the crown, and which had been considered as its property in the times of David II. Robert II. and Robert III. †. He consulted the charters of his tenants. He made it pass into a law, that no governor or regent should assume the privilege of alienating any lands which should fall to the crown. He called upon the Earl of March to defend the title by which he held a forfeited earldom; and, by a parliamentary judgment, and after a full discussion of his claims, he annexed the

* Buchanan, *Rer. Scot. hist. lib. viii.*

† Stat. James I. parl. 1424, cap. 9.

the estate and its dependencies to the crown. He recalled all lands which had been got by usurpation, and which were possessed under improper deeds. He annulled the grants to private men, of many forfeitures, escheats, and wards, which had belonged to the crown. He made known the inefficacy of donations of royal lands, and royal property, when made by regents and statesmen, to secure their popularity, and to protect themselves from envy. Frequent and eminent examples of justice added to the revenue of the crown, guarded it from encroachments, and were lessons of instruction to future princes *.

The estates of the kingdom, the clergy, the barons, and the commissioners of the boroughs, during the minority of James II. made

* Stat. James I. parl. 1431, cap. 133. Parl. 1434, cap. 135.

made a revocation of all lands, possessions, and property, which had belonged to James I. and had been granted without a parliamentary authority. And they ordained, that, till the majority of their prince, no alienations of the royal wealth should be effectual, without their consent*.

James II. had genius and talents for government. He neglected not the interests of his revenue. A posterior law invested him in many castles, gave him the lands in connection with them, and the grant of different manours, lordships, and earldoms. It annexed to the royal property the whole customs of Scotland, and it permitted the sovereign to satisfy, by compensation, those who had been pensioned upon them. It was the wish of parliament that these possessions should remain with the crown. No private deed of James, nor of his successors,

D

was

* Stat. James II. parl. 1437, cap. 2.

was to disunite them from it. To their alienation, gift, or sale, the advice of parliament was necessary, and the concurrence of weighty reasons of state.

The idea established itself, that the sovereign was not to waste the patrimony of the crown. The parliament interfered to correct the extravagance of princes. Nobles, courtiers, farmers of the revenue, and all whose rapacity and artfulness had extorted and won from the openness, the facility, and the generosity of Kings, any grants of the royal property, were to hold them by a precarious tenure. Acts of resumption were to strip them of these dishonourable acquisitions; and even to command the restitution of the profits they had received*.

James III. had no capacity for real business, was fond of the arts, and of amusements,

* Stat. James II. parl. 1455, cap. 41.

ments, addicted to favourites, and involved in disputes with his nobles. Yet the doctrine of attending to the royal revenue, had taken so firm a root, that a law of revocation of all gifts and grants to the prejudice of justice and of the state, distinguished his reign. The earldom of Ross, with other estates, and with castles and houses of strength, were knit and united to the crown; and a parliamentary act enjoined the master of the household, and the Lords of council, to be attentive to enforce the regular payment of the King's rents *. [G].

James IV. was magnificent and bold, and burned for opportunities of renown. He reposed a flattering confidence in his nobles, and he was beloved by his people. The estates of the kingdom were not inattentive to his dignity and splendour. Men

D 2 of

* Stat. James III. parl. 1476, cap. 71. 72. Parl. 1483, cap. 91. Parl. 1487, cap. 112.

[G]. NOTE VII.

of high rank were appointed auditors of the King's accounts *. Revocations were made of royal lands and royal property, to an ample extent, and in ample forms †.

The power exercised by the princes of Scotland, of resuming, on their majority, all gifts and dispositions of their revenue granted by governours and regents, was exerted by James V. ‡. An act also was passed for regulating the business of his exchequer ||. And, conformably to the practice of the Kings, his predecessors, he added to the royal demesnes all the unannexed lands, lordships, and castles, of which he was possessed; depriving himself and his successors of all power of alienation over them, without the advice and consent of

* Black acts, p. 87.

† Stat. James IV. parl. 1488, cap. 5. Parl. 1489, cap. 22. Parl. 1493, cap. 50. 51.

‡ Stat. James V. parl. 1540, cap. 70.

|| Stat. James V. parl. 1540, cap. 96.

of parliament, and without the spur and necessity of great and controuling motives*.

These maxims, and this attention, were practised by Mary, whom our historians have conspired to adore or to calumniate †. They were not forgot by James VI. who was ever dreaming of prerogatives, which no sovereign can exert but in a nation of slaves ‡. And, in the reign of this Prince, the annexation of the church-lands to the crown, in consequence of the reformation, brought to it an abundant accession of wealth ||. Charles I. § and Charles II. ¶

D 3

were

* Stat. James V. parl. 1540, cap. 84. 115.

† Stat. Mary, parl. 1555, cap. 28.

‡ Stat. James VI. parl. 1585, cap. 17. Parl. 1587. cap. 31. Parl. 1593, cap. 176. Parl. 1600, cap. 2.

|| Stat. James VI. parl. 1587, cap. 29.

§ Stat. Charles I. parl. 1633, cap. 9. 10.

¶ Stat. Charles II. parl. 1661, sess. 1. cap. 53. Sess. 2. cap. 8.

were not of a nature to despise rules and forms, which were to aggrandize the prerogative and the crown. And James VII. who, to the useless virtues of a monk, added the destructive vices of a tyrant, was in haste to exercise them †. [H].

Thus, in every period of the history of Scotland, it is to be thought, that the revenues for the royal state were fully sufficient for its wants and its grandeur. They were indeed to fluctuate, and to give way to accident and conjuncture. But, if abuses were frequently to take place, they were no less frequently to be corrected. And the power of resumption of royal property, possessed and exercised by our princes, offered a constant bulwark for the preservation of their wealth. Nor ought it to be forgotten, that the crown-lands had a
relation

* Stat. James VII. parl. 1. cap. 40. 42.

[H]. NOTE VIII.

relation to the varying condition of society. They were to stretch and to comply with the wants of the prince; and time was making new additions to his revenue. The authors, accordingly, who have been solicitous to describe the monarchs of Scotland as abject from poverty during the prevalence of fiefs, betray an ignorance and inattention which admit not of apology. They violate the evidence of our story, and the evidence of our laws.

S E C T I O N II.

The Expence of Government in distinction from the Revenue of the Prince. The great Source of both. Innovations with respect to them. The Sovereign finds himself in a critical Situation. The Spirit of Feudality gives way to that of Money and Commerce. The Aid for the Prince. The Aid for the Nation. Taxations on the Foundation of the Prerogative. Parliamentary Taxations. Extents, or Valuations of Land. The old Extent. The New Extent. The valued Rent.

THE natural establishment for the grandeur and the defence of a feudal state, was the grant of land from the crown. It created and maintained a wide arrangement of troops, of which the sovereign
was

was the commander. But civil jurisdiction, as well as military command, was connected with fiefs; and thus the offices of justice, as well as of war, were discharged by the vassals of the crown, and the other holders of territory. The landed property of the kingdom was accordingly the great source of wealth to the sovereign and the government. And, while the feudal institutions maintained their original spirit and vigour, they were well calculated for the purposes both of defence and of justice. All taxes were then unnecessary and unknown.

But the system of fiefs, so suitable to the times in which it rose, could not agree with the maxims of commerce, and with the growing pride and luxuries of society. It was to undergo variations; and these were to act upon the sovereign and upon government. Whatever care might be bestowed upon the demesnes of the prince, the
grant

grant of land, which paid the military and the political expence of the state, could not be upheld in a fixed and certain situation. It suffered encroachments, and became subject to alienation. The military arrangements of fiefs were to be turbulent, and without efficacy. Their civil jurisdiction was likewise to decay. The crown-vassals were to be unfit for war, and unfit for justice.

In the breaking down of the feudal system, it seemed to the prince, that cruel disorders were to threaten the most fatal revolutions, and to dissolve all the parts of the government. They were yet the germ of the stability that was to be given both to the crown and to liberty.

By the scheme of feudality, land was the medium of the conduct of men. It called them to act, and it was the reward of their action. It was the salary of the captain

captain and the judge. Now, in a situation where the captain and the judge were not disposed to be active, or were disqualified for their duties, calamities were necessarily to ensue. But the utilities of society, and the purposes of civil life, were to be fulfilled. If the proper actors were incapable or idle, they had no claim to the free enjoyment of lands, which had been given under a burden. It was perceived that other men might discharge their duties; and out of their estates a payment was to be drawn for the satisfaction of these. The value, the largeness, the extent of land, rendered it a most improper instrument for action. Money was to be substituted in its place, and to pay the services to which it had been subjected. All the appearances of society were to be altered. Feudality decaying, commerce was to flourish. The contributions called out from the proprietors of territory, were to be in discharge of duties which they owed to the state.

And,

And, as trade was to increase, the land of a kingdom was not to be confined exclusively to taxation. The merchant and the manufacturer were to contribute for the protection afforded to them against an enemy, and against injustice. Customs and excise were invented ; and time was preparing the business and the decorations of that complicated, that magnificent, and that animating scene, which nations are to exhibit in the ages of perfection and opulence.

The conduct of the sovereign, in the disordered times of feudality, illustrates this reasoning. When pressed himself by an urgent occasion, the rules of the feudal institutions had taught him to have recourse to the aid, or the benevolence of his vassal. This aid, which was at first the voluntary present of his tenant, he was in time to command as a right. Instead of
making

making a request for a supply, he issued a mandate for it *.

This exaction had a reference to himself; and he was to act in a similar method to supply the exigencies of government. When his vassals were not to perform their services, he was to levy an aid or a fine out of their lands, to compensate this neglect. Conscious of incapacity, or averse from all inclination to their duties, his vassals did not oppose this demand. And it was just that the grant of land should provide for the ends for which it was given. Habits lead to establish a rule; and custom is often as effectual as law. Aids feudal and political, aids with regard to the crown †, and with regard to government

* Sir John Dalrymple, treatise on feudal property, ch. 2. sect. 2.

† Spelman and Du Cange, voc. auxilium. Anderson, Diplomata Scotiae. tab. 35.

ment *, grew into taxations. And the sovereign, when impelled by his humour and prodigality, as well as when urged by great and national motives, lifted up contributions for his own use, and for the uses of the state.

Nor, on occasions in which the government and the state were more particularly concerned, did the prince confine himself to the lands which were holden in feudality ; and of which it was the intention to provide for public defence and for public justice. Territory in foccage and allodality was likewise subjected to his tyranny. And *Hidage* and *Carucage* were to denote in Scotland, as well as in other nations, those formidable taxations which were to be extorted and gathered, without distinction,

* Brady, tracts, p, 117. 118. 119. 120. Du Cange, voc. Scutagium.

distinction, from the whole landed property of a kingdom *.

It was thus that taxations were to be levied on the foundation of the royal prerogative ; and they did not seem to be oppressions in their rise. A real and a pressing expediency gave a sanction to them. But their exorbitancy and their frequency were soon to awaken suspicions. Sovereigns, goaded on by avarice, and allured by ambition, made extensive and disgusting encroachments upon the property of their subjects. The power of taxation was found to be a most destructive privilege. From complaining of its abuse, the people were to inquire into its origin and propriety ; and princes, in order to soothe and flatter them, were to declare, that the contributions

* Du Cange gloss. voc. Carrucagium, Hidagium. Spelman, voc. Carua, Hidagium. Brady, glossary to his tracts, p. 3. Reg. Majest. lib. ii. cap. 16.

butions they received, should not be accounted as precedents and as law.

But, in matters of this high importance, deceit and address were not always to prevail. There is nothing so valuable to men as their property ; and flattery cannot conceal the outrage of insult, and the violence of oppression. The nation demanded to be consulted in the aids it was to bestow. The original freedom of the government had conferred upon them this right ; and it was illustrated by frequent declarations from princes, that the aids they received were gratuitous contributions. The authority of the parliament was to succeed to the will of the sovereign. The national council, and not the prerogative of the King, was to judge concerning the wants of the state, and the taxations which were expedient.

Previous

Previous to the times of William the Lion*, taxations had taken place on the foundation of the prerogative; and the mandates of the Prince had often distressed the lands of the kingdom. But, as in this reign there are examples of parliamentary aids, it is to be thought, that the power of taxation had already passed away from the Sovereign to the Nation; and that the age of William is to be considered as the epoch of a transaction the most memorable.

When this high-spirited Prince was the prisoner of Henry II. the Scottish nation surrendered its independency to procure his enlargement. Henry did not scruple to receive the homage of William and his barons. But Richard I. smit with the glory of undertaking a crusade, consented to restore its independency to Scotland,

E conciliated

* He was crowned, an. 1165.

conciliated the affections of William, and received ten thousand marks as the price of this restitution. Ten thousand marks were equal to a hundred thousand pounds of our present money. This immense sum could not be supplied out of the private revenue of William ; and it was to operate a national advantage. It was levied accordingly by an aid from his subjects ; and this aid was by a parliamentary authority *.

There is evidence in this reign of a taxation by parliament, still more explicit and particular. In consequence of an agreement with King John of England, who succeeded Richard I. William became bound to pay to him the sum of fifteen thousand marks. For the discharge of this engagement a parliament was called at Stirling. The matter was not long in discussion. The barons gave a grant of ten thousand

* Buchanan, *Rer. Scot. Hist.* lib. vii. Brady, *Hist. of England*, vol. 1. Appendix, No. 67. No. 68.

thousand marks, and six thousand marks were given by the boroughs*.

From the moment that aids on land, whether by the authority of the prince, or of the parliament, were to be levied, it was necessary that valuations of the territory of the kingdom should direct the assessment of the proprietors ; for, without these, no justice or equality could be observed in the mode of taxation. To search, however, in our historians, for the first survey or extent that was made in Scotland, must be in vain. No memorial of this transaction is to be found. But, long before the days of Alexander III. valuations of its territory were to be framed, to be considered as rules of taxation, and to be abolished. This aera, notwithstanding, is the farthest point to which, it is supposed, that

E 2

we

* Fordun, lib. viii. Lord Hailes, Annals of Scotland, vol. I. p. 139.

we ought to look on the subject of extents. The lawyers of Scotland have said so. The general valuation by Alexander III. is treated with a most particular respect. It is called by way of distinction, *the old extent*. [I].

But, lands being to fluctuate in their rents and profits, no rule that was fixed could answer long the purposes of taxation. A re-valuation of lands, it is conjectured, was made, when a tax was to be imposed for the ransom of David II*. And there is an indubitable evidence of a valuation in the times of James I. †. But the variations of property and of money, by detracting from the utility of these measures, gave rise to other regulations. It was ordained in the reign of James III. that the jury should express in their inquiry, or return, not only the old extent of the estate

[I]. NOTE IX.

* Mr Erskine, *Institute of the law of Scotland*, p. 225.

† Black Acts, fol. 3. and 4. James I. parl. 1424.

of a deceased proprietor, but its exact value at the period of the investiture of the heir. This transaction was deemed equal to a valuation; and it obtained the appellation of *the new extent* *.

Principles or maxims of taxation, in conformity with the circumstances of the times, and in consistency with justice, were in this manner to be placed in the eye of the legislature. But, while the state was thus directed how to levy its subsidies, the sovereign and subjects-superior were also informed how they might adjust and collect the feudal casualties of their vassals. The new extent was the measure of assessment in the latter condition. In the former, the old extent was esteemed the more equitable mode of taxation.

To Robert I. the parliament assembled at Cambuskenneth, in the year thirteen hun-

E 3

dred

* Parl. 1474, cap. 56.

dred and twenty-six, gave a subsidy, during his life, of the tenth penny of all the lands of the earls, barons, burgesſes, and freeholders throughout the kingdom. This subsidy, which was rendered necessary by the expences and calamities of long wars, was to be levied according to the old extent *.

According to the old extent, all subsidies were levied till the usurpation of Oliver Cromwell. His parliament, in the year 1656, established a new method of taxation. Upon the Restoration, however, the old extent was again recurred to†. But it was almost immediately abandoned. For, when a taxation was imposed in the 1667, the new method was adopted and improved; and, in this state, it continues to be in observation. Extents on the foundation

* See the Indenture of this transaction in the Appendix.

† Act of the convention of estates, 1665.

dation of it by the commissioners for levying the land-tax, have the name of *the valued rent*; and this valuation is the rule for the assessments of the property of individuals*.

CHAP-

* Act of the convention of estates, 1667.

CHAPTER IV.

Jurisdiction and Courts.

SECTION I.

The King's Palace and Court. The Members of the King's Court. The Officers of the Crown. The Chancellor. The Justicier. The Chamberlain. The Seneschal, or the Steward. The Constable and the Marechal. The Influence and Lustre given by them to the Crown, and by the Tenants in Capite.

IN the fabric of feudality, the object which attracts most the attention, is the Sovereign. His power was great, his splendour greater. He was the bond of connection which tied together all the parts of the kingdom. The barons and the military

litary tenants of the crown were bound to attend him as their chief lord. To his palace they resorted to pay attention to him, to make themselves known, and to acquire distinction. Coronations, creations into knighthood, and all solemn festivals, were celebrated in it.

It was also in his palace that the Sovereign was usually to hold his court, and to exercise jurisdiction. The nobles and military tenants of the crown were constituent members of this assembly, and met in it at stated times. The business of the Sovereign, and the business of the people, were matters of its deliberation. Here the vassals of the Prince might offer him their advice on subjects of state; and here the disputes of the great were decided, and appeals were received from inferior judicatures. In this convention the Sovereign might act in his own person, or by his justicier,

sticier. It was termed the King's Court, or the King's Council *.

Out of the number of the nobles, and the tenants *in capite*, the different officers of the crown were elected. These were the chancellor, the justicier, the chamberlain, the high steward, or seneschal, the high constable, and the mareschal. The duties they exercised individually were of the highest and the most general importance; and, when they met together in the royal palace, they were the most illustrious ornaments of the *Aula Regis*, or the court of the King.

The chancellor superintended and directed the business of the chancery. He examined all the charters which were to pass the great seal, of which he was the keeper. He directed royal grants of property and office;

* Du Cange, gloss. voc. Curia.

office ; and writs and precepts, in judicial proceedings, received their sanction from him. His dignity advanced as charters and public instruments of the crown were to multiply. In the reign of James III. he was usually to rank after the Princes of the blood. James VI. by an express ordinance, ascertained his precedency beyond all other officers. And, in the reign of Charles II. a particular law declared, that, by virtue, and in right of his office, he was to preside in all meetings of parliament, and in the public judicatures of the kingdom*.

Of the great justicier, or justice-general, it is to be thought, that, in very ancient times, he surpassed in authority and splendour all the other officers of the crown. He exercised an universal jurisdiction

* Malcolm II. cap. 2. Stat. Rob III. cap. 1. and 9. Crawford, Officers of the crown, and of the state, p. 3. Stat. Car. II. parl. 1661, cap. 1. Spelman, voc. Cancellarius.

dition both in civil and criminal matters*; and, in the absence of the Sovereign, he was even to act as viceroy, or as guardian of the state. He held his court at two terms in the year †. His arm could reach from one corner of the kingdom to the other. But, amidst the general extensiveness of his powers, it is to be remarked, that treason, and the four pleas of the crown, belonged to him in a more peculiar manner ‡. But, as business was to increase, and to grow complicated, it became necessary to appoint *justices-errant*, or *itinerant* §. These were subordinate to the great justiciary. They travelled through the kingdom to execute justice; and their decrees might be submitted to his review §.

The

* Reg. Majest. lib. i. cap. 1. 5. lib. ii. cap. 16. Iter Justitiarum.

† Stat. Rob. III. cap. 30. Quon. Attach. cap. 79.

‡ Reg. Majest. lib. i. cap. 1. lib. iv. cap. 7. 8.

§ The *Missi Dominici* of the Franks were similar officers; and *Justices Itinerant*, it is probable, were known in all feudal countries. Du Cange, Gloss. voc. *Missi*.

§ Spelman and Du Cange voc. Iter. Justitarius.

The high chamberlain had the care of the King's person, and was keeper of the royal wardrobe. In matters of finance, he had a general authority ; and he exerted jurisdiction over the train of officers who collected the revenues of the crown. Of all the royal boroughs, he possessed a peculiar charge ; and he held his assizes and circuits in them. He inquired into the management of their magistracies, and into the applications of their property. He decided the complaints and disputes of burghesses and craftsmen, and adjusted the prices of provisions. He regulated the modes of barter and sale ; and judged in whatever had a reference to conveniency and police*.

Next to the chamberlain was the high steward. He had the government of the King's household and family. He furnished the palace with provisions, procured corn for the King's horses, attended to the
royal

* LL. Malcol. II. cap, 4. Iter Camerarii.

royal forests and game, and inspected the behaviour, and punished the delinquencies of the King's domestics and servants. In some foreign nations, this officer was not of such high precedence as in Scotland. Here, from the personal greatness of the house, in which the office came to be hereditary, he grew to a great and shining eminence. The title of the office was assumed as the surname of the family who had possessed it; and they were to mount the Scottish throne in the person of Robert II. and to be illustrious and interesting in alliances and blood, in arms and virtues, in weaknesses and misfortune*.

The high constable possessed signal prerogatives. When the Sovereign, upon his advancement to the royalty, was to swear fidelity to his subjects, and to pay homage to the laws, he delivered his naked sword into

* LL. Malcol. cap. 5. Du Cange, voc. Senescalcus.

into the hands of the constable. ‘ Use
‘ this in my defence,’ said he, ‘ while I sup-
‘ port the interests of my people; use it
‘ to my destruction when I forsake them’ *.

A naked sword, of consequence, was the badge of his office. When the King’s armies were in the field, he had a supreme command over all persons. He described the ground for the camp, placed the centinels, sent out spies to observe the enemy, and gave their orders to all the officers. But, when the troops were in castles and garrisons, his authority did not extend to them. In points of honour he exercised a superior jurisdiction; holding courts of chivalry, and regulating the ceremonial of those duels, in which pride and virtue vindicated their rights and dignity from rudeness

* It was in allusion to this form, that Buchanan made a naked sword to be represented on the money coined in the minority of James VI. with these words, *Pro me, si mereor, in me.* Anderson, *Diplom. et Numismat. Scot.* Thesaur. tab. 166.

rudeness and insult. All disorders and riots, bloodshed and slaughters, which were committed, and took place within four miles of the King's person, of the parliament, and the privy-council, were judged and punished by him. Military contracts and customs of arms were proper objects of his cognizance; and he had powers of action in all matters connected with war, in which the common law could afford no assistance *.

Though inferior in rank to the constable, the mareschal was of great dignity. The constable presided over the whole army; the mareschal was master of the horse. In the court of chivalry they were judges, and decided there concerning matters of honour and of arms †. In the camp
and

* Spelman, voc. Constabularius. Du Cange, voc. Comes Stabuli.

† Sir Thomas Craig affirms, that, in the court of chivalry, the mareschal was the sole judge, and that the
constable

and in the field they united their counsels, to direct the troops, and to perform with success the duties of commanders*. [K].

These officers, so various in their privileges, and so important, were in subordination to the sovereign. He was the fountain of honour and justice; and his court, next to the parliament, was the seat of highest judicature. Pleas of the crown, and common pleas, might be judged in it. His subjects might submit to him their wrongs, civil and criminal, by complaint and by appeal; and it was his duty to protect the weak, and to give relief to the injured.

F

The

constable had no authority there. *Jus Feudale, lib. i. Dieg. 12.* He gives, however, no reasons for his notion; and the propriety of the opposite opinion is demonstrated by my Lord Coke. 4. *Institute, cap. 17. 18.*

* Daniel, *Histoire de la Milice Française*, liv. 3. Spelman, gloss. voc. Marefcallus.

[K]. NOTE X.

The officers of the crown, deriving their distinctions and powers from the sovereign, were to add to his greatness, in their own persons, and in those of their vassals and dependants; and, it is to be conceived, that, with the other tenants *in capite*, who studiously displayed their magnificence and wealth, they were able to cast a splendour around his throne, which was superior to the pomp and parade of more polished ages. [L].

SECT.

[L]. NOTE XI.

S E C T I O N II.

The State and Jurisdiction of the Nobles.

The Baron, the Earl. Palatinates or Regalities. The Courts of tenants in Capite of the Crown ; and of the Tenants of a Subject-superior. The Possessors of single Fees ; and the Possessors of the Members of a Fee. The Subordination of Jurisdiction.

THE nobles were eminent in grandeur and in jurisdiction. The fashion of their palaces bore a resemblance to that of the Sovereign. The baron had his steward, his chamberlain, his marshal, and his other officers. With these he held councils ; and their advice directed him in the grants of his property, and the investiture

ture of his vassals, in the revenue of his feignerie, and in all the business which had a reference to his household and greatness. To his interest they were attached by the knight-fees he bestowed upon them. In their military capacity, they attended him when he marched against an enemy; and they guarded at home his house of strength or his castle *. [M].

His jurisdiction was ample, and extended over his estate or territory. In his court he was a minister of justice to his vassals and retainers. He judged of all civil deeds, and determined concerning all crimes, but treason and the four pleas of the crown, which were murder, robbery, fire-raising, and rape. His tenants were the suitors of his court, and assisted in his deliberations

* *Registrum Honoris de Richmond*. Household-book of the fifth Earl of Northumberland. Spelman, gloss. voc. Baro.

liberations and judgments. The decisions he pronounced were put in execution by his bailiffs, when no appeal was carried to the Sovereign. Fines, forfeitures, and imprisonment, were usually the punishment of lesser offences. The blood of the criminal atoned for atrocious injuries*. [N].

The state and jurisdiction of the Earl were similar to those of the Baron. But the court in which the former exercised the more solemn acts of jurisdiction, was the court of the county, to which every holder of property in land was a suitor. The power of the Baron did not go beyond the limits of his seigneurie. The Earl, however, possessed not always his county as a fief; and, when he enjoyed only a portion of its property, and was constituted to exert

F 3 authority

* Reg. Majest. lib. 1. cap. 4. LL. Malcol. II. cap. 9. 11. Craig, Jus Feudale, lib. 1. dieg. 12. Du Cange, voc. Baro.

authority over the whole, the third penny of the county, or a third part of the profits of justice, was to reward this extension of his trouble *. [O].

An earldom and a baronial fief, though great and splendid, were inferior to the fief of regality. The lords of regality in Scotland were the same with the earls-palatine in England †. Their powers were like those of the Sovereign. They coined money, enacted laws, and lifted taxes within their dominions. They had a right to declare war, to levy troops, and to exercise the prerogative of life and death. Their jurisdiction was supreme and without appeal. The King's writ did not run within

* Selden, *Titles of honour*, part 2. ch. 5. Spelman, *voc. Comites*. Du Cange, *voc. Comes*.

[O]. NOTE XIV.

† One earl only, with the title *Palatine*, is mentioned in Scotland. This is *Walterus Palatinus de Strathern, et Atholiae et Cathaniae Comes*. *The works of Sir George MacKenzie*, vol. 2. p. 542.

In the range of feudality, there were tenants of the crown, or *in capite*, who enjoyed knight-fees, and were neither earls nor barons. These were considerable, in proportion to their possessions. To perform the military service to which they

were

[P]. NOTE XV.

were bound, they gave out *fees* ; and these grants corresponded to the number of the soldiers or knights they were to furnish. They had thus vassals, and, of consequence, jurisdiction. They had a care over their manours. Their vassals or tenants repaired to their houses or halls, received their orders, and constituted courts where their debts and disputes were determined. Yet, if the judgments given in these judicatures were not satisfactory, the matter might be carried to the county-court, or might be submitted to the King's justices in their circuits *.

This manerial jurisdiction was likewise exercised by the tenant who enjoyed fees from the nobility and the simple vassals *in capite*. When he had more fees than one, and he might possess many, he gave out portions

* Stat. Alex. II. cap. 3. Stat. 1. Rob. I. Praefat. Du Cange, Gloss. voc. Vassaticum, Vassalli. Brady, Gloss. to his tracts, voc. Libere tenentes.

portions of his estate to procure his number of knights. With his knights and tenants he sat in judgment to determine their affairs. And from his court the parties in litigation might complain to his superior lord; and from his superior lord, a plea was competent to the King or his judges *. [Q].

In the splitting down of jurisdiction, even the possessor of a single fee, whether from the crown or a subject, claimed his court and his usage. What is more surprising, the divisions of a fee to an eighth part, were called *members* of the fee; and the possessors of each of these parts had manours and jurisdiction. And, beyond the eight parts which were members of the fee, divisions might multiply to the fortieth, the fiftieth, and the

* LL. Malcol. II. cap. 8. Spelman, Gloss. voc. Valvafores. Craig, Jus Feudale, lib. 1. dieg. 10.

[Q]. NOTE XVI.

the fixtieth particle or fragment. The holders of these, however, possessed neither manours nor jurisdiction *. [R].

A regular subordination, as well in justice as in military command, was established from the Sovereign to the meanest of the military tenants, to the lowest soldier who served in the ranks. Every thing flowed from the King; and every thing might flow back to him again. No case could happen, except in regalities, but might be subjected to his review, or to that of his judges. He caught every eye, and made the connection of feudality to extend to the most distant corner of his kingdom.

The genius of the feudal law, the passion for war, and the combined character
of

* View of Society in Europe in its progress from rudeness to refinement, book ii.

[R], NOTE XVII.

of the commander and the judge, produced all these wonders. But this singular system, while it carried along with it those poisonous qualities which destroyed it as a military institution, was also to perish as a scheme of jurisprudence.

SEC-

SECTION III.

The Decline of the Feudal Jurisdiction. The Origin of the Sheriff. The Advancement of his Powers. The Humiliation of the Nobles in their Judicative Capacity. The fall of Regalities. The Shock of inferior Judicatures. The Confusions which thence arise. The King's Court is affected. Its Fall. The Rise of regular Courts. The Privy Council. The Court of Session. The Court of Justiciary. The Court of Exchequer. The Destinies of the Seneschal or High Steward, the Constable, and the Marshal.

THE institutions of the feudal law required, that the same customs and pursuits should constantly prevail. They were suited to times which were simple and warlike, but could not exist under the influence

influence of commerce and refinement. The restless genius of man courts new scenes of action and amusement. The rude occupations of war cannot for ever allure. Its duties, its fatigues, its dangers, were to disgust the posterity of those whom they had conducted to renown. The softness of peace, the varieties of civil life, were to come with their attractions. Trade and the arts were to be cultivated. New passions and propensities were to exhibit society under a different aspect. That system which had governed so long, was to be assailed on every side. And its extensiveness, its nice dependencies and connections, its regularity itself, which seemed to give the promise of a lasting duration, were to be fatal to it.

That love of enjoyment and ease, which induced the possessor of the fief to consider his military service as a burden, made him regret the civil duties to which he was bound

bound by his grant. If he wished to be no longer a foldier, he was still more anxious to lay aside the fatiguing formalities, and the endless embarrassments of a judge. He was disposed neither to lead his vassals to the field, nor to summon them to his court. A length of time, and the exertions of property, had so consolidated in his mind his right to his estate, that he fancied he was entitled to it, without any service or restriction. The claims of superiority appeared to him a disgrace; the obligations of vassalage, a servitude. The superior, whom his fathers had acknowledged as a benefactor, he regarded as an invader and a tyrant.

The necessary absence of the nobles from their estates, while engaged in war, or at the court of their Sovereign, had produced, in the earliest times, the expedient of electing an officer, who, on such occasions, might preside in their territories. This
officer

officer was the *sheriff*; a magistrate weak in his origin, and dependent on their power for his existence. In strict propriety, he was the substitute of the earl; but, after the times of knight-service, he was also to act for the baron; because every barony was situated in some county or earldom. His jurisdiction and cognizance were thus over extensive possessions. And, to secure his importance, he attended to the law as a science, introduced distinctions into business, and loaded it with forms.

This officer was not to be always at the devotion, and in the appointment of the nobles. The Sovereign perceived the advantage to be derived from men, who, applying to affairs, became qualified to discharge them. Availing himself, therefore, of the indolence, the neglect, and the incapacity of the earls and barons, he was gradually to assume the power of nominating the sheriff. His interest, and estates in particular

particular counties, and his supereminent jurisdiction in all, were titles upon which he might openly interfere. The nobility, disgusted with business, and wanting foresight, did not act with concert. The crown became possessed of an instrument, which it might employ to their prejudice. [S].

The judicial superiority enjoyed, over an unlettered nobility, by men trained to, and practised in jurisprudence, was immense. Their powers, of consequence, grew to be exorbitant. They succeeded to the jurisdiction of the earls and the barons, and judged in almost every case which could happen. The court of the county could not be constituted without them; and, as the rules of the feudal law required the nobles to pay presence and suit in this court, they had the mortification to assist the

[S]. NOTE XVIII.

the officer, who had swallowed up their greatness *.

Beside his judicial importance, the sheriff had fiscal powers. He lifted the king's rents in his counties, managed his transactions in money, attended to tallages and taxes, and had the charge of the feudal incidents of the royal tenants. He was also to pay attention to the army and to the militia †.

In the tendency of the feudal system to perish, the prince found an incitement to his ambition. . The advancement of the sheriff, and the decline of the ordinary nobility, paved the way for the destruction of regalities. The royal arm increased in
G strength.

* Balfour, *Præctics*, title, 'Of the Shireffis. Skene, *de verb. signif. voc. Schireff*.

† Spelman, *Gloss. voc. Vicecomes*. Madox, *Hist. of the Exchequer*, vol. 1. p. 353, vol. 2. p. 103. 104.

strength. But it did not venture to strike one deadly blow at the root of those high prerogatives, which had advanced so many subjects into princes. Art, as well as courage, was employed to overthrow them. When a regality was to fall into the king's hand, it was to be accounted as royalty, and to be governed by the king's judges, while it continued in his custody*. Steps more important were to follow. Regalities which came to the sovereign, were to be fully and uniformly subjected to the royalty. It was enacted, that no regality should be granted, without the *deliverance* or authority of parliament†. It was ordained, that no lord of regality should be able to interrupt the peace of the nation, by breaking out into war; and that, in situations of this kind, he should be a criminal, and obnoxious to the laws‡.

The

* Stat. James II. parl. 1449, cap. 25.

† Stat. James II. parl. 1455, cap. 43.

‡ Stat. James II. parl. 1457, cap. 72.

The agitated condition of the great vassals, communicated a shock to all inferior orders. A small innovation, upon a system where the subordinations are long and regular, is capable of producing a lasting disorder. Alterations, violent and momentous, were to act with a proportioned efficacy. Every part of the vast machine of feudality was to be moved and shaken. Jurisdiction interfered with jurisdiction. Judges were repledging from judges. Struggles in the midst of confusion were adding to it. Connections were broken down; and enmities were engendered. Alienations of feudal property, and the rigorous exaction of the perquisites of tenure, communicated their proportion of disquiet, and augmented the general calamity. The long range of superiors and vassals, was filled with suspicions, and thrown into contention. Their rights, their privileges, and their properties, seemed all to be at hazard. And, amidst their

disgusts, their fears, and their disaffection, they did not know what to acquire, or what to defend.

A most intimate connection had taken place between the sovereign and the sheriff. He was also to possess, at all times, great authority with the officers of the crown, or his judges. Yet, the part they were to act, was not the consequence of a project which had been framed in the closet, and premeditated with anxiety. For the king's court, the natural support of his greatness, was itself to suffer.

The *Aula Regis*, or the court of the king, was constituted upon a feudal model. The chancellor, the justicier, the chamberlain, the seneschal, the constable, and the marshal, held fair possessions from him, as tenants *in capite*, and were bound in the strict ties of feudal obligation. In matters of state they were his prime counsellors.

In

In affairs of the people they were judges. Placed in this singular situation, the convulsions now experienced were to operate upon them with violence. As barons, their interests were opposite to those of the sovereign. As officers of the crown, they were to know no party but his. As judges, they were bound to impartiality, and to be without passions, like the laws. The prince could not continue to them his confidence, without danger; and they could maintain no favour with the people, whose reasons of distrust were still more powerful.

A situation was come, when it was difficult for them to act with prudence, and impossible with honour. The emergency of the times overcame them. The King's court fell to the ground, and discovered its grandeur in its ruins.

G 3

But,

But, though the king was deprived of his court, it was not proper that he should want officers, with whom to consult and to deliberate. He selected, accordingly, a body of men, who were to meet in his palace, and in whom he might confide. It was not a qualification of such men, that they were connected with the crown in a feudal alliance. The mere will of the sovereign was sufficient to their constitution. His commission or nomination gave them an existence, which he might terminate at his pleasure. The board of *Privy-council* was thus founded. Hence the distinction of 'officers of the crown,' and 'officers of the state;' the former appellation having a respect to the members of the *Aula Regis*; the latter to the courtiers who succeeded them.

The board of privy council, however, which was to arrive at great eminence, and to be lost in the privy council of Great-Britain,

Britain, was not the only jurisdiction which arose out of the king's court. It was to give a beginning to all the higher judicatures of the nation. And, as the bent and direction, from the spirit of feudality to that of commerce, had taken place, the forms they were to assume, and in which they were to settle, could boast an utility and a value, which they might never have attained, if they had been established all at once, and by one act, on the plans and suggestions of civil wisdom.

Among the officers of the *Aula Regis*, the *Chancellor* had risen to the highest dignity. Those general concerns, therefore, which had been competent to the king's court, were entrusted to him in conjunction with a committee of persons appointed by the sovereign from the estates of parliament. This jurisdiction obtained the name of 'the session;' because it was to

fit in particular places during a regular time, at three periods in the year *.

To the powers and forms of this constitution, improvements were communicated by James II. †. But it was still imperfect. The shortness of its sessions served to encourage the negligence of its judges, and gave rise to a multitude of inconveniencies distracting to justice, and prejudicial to the subject. James III. accordingly, paid an attention to promote the utilities of this court ‡. And James IV. was to appoint another body of judges, and not out of the estates

* Stat. James I. parl. 1425, cap. 65.

This institution is ascribed to James I. ; but, I am apt to think, that his act on the subject to which I have just referred, would have been more formal and explicit, if it had been meant as creative of ' the session.' This court was probably of an older aera, and it might be the intention of his act to give a regularity to its meetings.

† Parl. 1457, cap. 61. 62. 63.

‡ Parl. 1469, cap. 27. Parl. 1475, cap. 63.

estates of parliament, who were to sit continually in Edinburgh, or at whatever place might be agreeable to him. They had all the powers of 'the session,' and were called 'Lords of the daily council *,' But, adopting a model still more complete, James V. instituted 'the College of Justice,' of which the senators were called 'Lords of Council and Session.' The powers of 'the session' and those of 'the daily council,' were vested in this judicature. It was advanced to privileges still higher and more splendid. A regularity was communicated to it; proper sessions and modes of procedure were invented and commanded; and time made it to grow into the condition in which it exhibits itself at this hour †.

In the *Aula Regis*, the officer the most formidable was the great justicier. When
it

* Parl. 1503, cap. 58.

† Parl. 1537, cap. 36—69. Parl. 1540, cap. 93.

it fell, he was to lose an immense proportion of his jurisdiction. All civil suits were gradually to go away from him [T]; and he was to judge only in criminal matters. [U]. The itinerant justices, who had been subordinate to him, were to be changed into eight deputies, who were to act under the authority of the sovereign himself, or by the appointment of the justicier, or justice-general *. Two deputies being to go to each quarter of the kingdom, the whole country was to enjoy the advantage of their circuits. These deputies did not continue in jurisdiction any longer than till the year sixteen hundred and seventy-two †. Five Lords of Session were then conjoined with the justicier or justice-general, and with the justice-clerk; and in this form the justice-court, or the court of justiciary,

[T]. NOTE XIX.

[U]. NOTE XX.

* Stat. James VI. parl. 1587, cap. 81.

† Car. II. parl. 1672, cap. 16.

sticiary, continues to subsist, though with greater order, and with added powers *.

The chamberlain, who had acted in the *Aula Regis*, and who had judged in all questions of revenue, was to be included in its fall. But his court, after suffering many alterations, was to be stationary in the court of exchequer as now established †. The seneschal or high steward was lost as a real officer; and the title became inherent in, and peculiar to the eldest sons of the Kings of Scotland ‡. And, in the decay of the feudal manners, and in the changes of the military discipline, the offices of the high constable and the mareschal growing to be useless and unnecessary, sunk into hereditary and titular honours, and gave

* 6. Ann. cap. 6. 10. Ann. cap. 33. 20. George II. cap. 43.

† Stat. James V. parl. 1540, cap. 96. Car. II. parl. 1672, cap. 16. 6. Ann. cap. 26.

‡ Craig, Jus Feudale, lib. 1. dieg. 12.

gave distinction to the families of Errol and Keith *.

These were the fortunes of the *Aula Regis*. The disorders of feudality, circumstance, and the experience of calamity, much more than the ambition and the schemes of our monarchs, served to direct, to rear up, and to confirm our political establishments. Yet to the latter they are perpetually ascribed. It is easy to talk of the great power and the deep projects of princes. It is more difficult to mark the slow operation of events, to separate accident and wisdom, and to behold society and man in their progress.

CHAP-

* The works of Sir George Mackenzie, vol. 2. p. 540.

CHAPTER V.

The National Council. The mixed Form of Government. The Parliament of Scotland. The three Estates of the Realm. Barons by Tenure, by Writ, and by Patent. Earls by Tenure, and by Creation. The Peerage ceases to be Territorial. Tenants in Capite by Knight-service. The Origin of the Knights of the Shire. The Boroughs. Distinctions in the History of Towns. Their Representation. Enumeration of the Branches of the Legislature. The Lords of the Articles.

THE national council was more honourable than all other courts, and transcendant in its jurisdiction. No causes, no persons, could confine it within bounds. The legislative authority of the state was lodged in it by the constitution. It was composed

composed of the King, the nobles, and the people, who acted as controuls to one another. The attention they applied to their peculiar rights communicated a harmony to the whole system. Political liberty was the result of its action. [X].

This beautiful structure was first thought of in the woods *. Among the antient Germans, says Tacitus, the king has no absolute or unlimited dominion ; the nobles having a direction in matters of smaller import ; and those of a general concern being the care of the people †. By the natural liberty of the barbarians, and the feudal institutions, which grew out of their antient manners and their new situation in their settlements, the mixed form of government was engendered. Antiquity had not known this polity. Its poise and balance

[X] NOTE XXI.

* Montesquieu, lib. xi. ch. 6. Historical dissertation concerning the antiquity of the English constitution.

† Tacit. de Moribus Germanorum.

lance of powers were a secret till modern times ; and it seemed to unite all the advantages of all the other modes of administration. It possessed the expedition of monarchies ; for the prince was to execute. It possessed the freedom of democracies ; for the people were a branch of the legislature. It possessed the firmness and vigour of the aristocratical forms ; for the privileges and influence of the nobles guarded against popular caprice and tumult. It was valuable in its separate capacities. It was more illustrious in their union. Its constituent parts, conjoining into a body, were to make laws, and to secure, establish, and maintain the tranquillity of the individual, and the grandeur of the nation.

This civil constitution prevailed in Scotland, as well as in the other nations of Europe. In all of them, however, it was distinguished by peculiarities. The great lines of resemblance were to remain ; but circumstances

circumstances of discrimination discovered themselves in each, diversifying the aspect of its government, and giving a variety to its progression.

The Scottish Sovereign came to parliament to preside there, and to act with the three estates of the realm. The spiritual lords constituted the first estate; the temporal lords, and the tenants *in capite* were the second; and the third consisted of the commons.

In the times of feudality, privileges were to follow the possession of property. It was as holders of *baronies*, as well as heads of the church, that the bishops were bound to attend in parliaments. It was as holders of *baronies* that the temporal lords assembled there. It was as holders of *fees* from the crown, that the tenants *in capite* made their appearance in them*.

Alterations,

* Hody, history of councils and convocations, p. 126.

Spelman,

Alterations, in the state and ideas of feudal property, were, of consequence, to create alterations in the condition of these
H assemblies.

Spelman, voc. *Parlamentum*. Selden, *Titles of honour*, part ii. ch. v.

I know that the *barony*, and the *estate in capite* were not originally the grounds of admission to general councils. For general councils were known in the woods of Germany. It was in the course of time, and in the progress of fiefs, that they were to characterise those classes of men who had possessed this privilege. At first they were descriptive of a character; and afterwards they came to be necessary and constituent parts of it.

With regard to the clergy, they, every where in Europe, succeeded to the rights of the priests of the conquering tribes; and one of these, as we learn from Tacitus, was an attendance in national assemblies. It was, therefore, as ministers of religion, that they first voted in parliaments. It was after the times of the perpetuity of the fief that they appeared as *barons*. But what is remarkable, the bishops were to sit in the double capacity of *bishops* and *barons*; and the abbots, who, of old, had voted as *such*, were to sit by the sole title of their *tenures*, that is, as *barons*. Those abbots who were not tenants *in capite*, did not sit in parliament.

assemblies. In the decline of the feudal system, the disorder which enervated and destroyed the military arrangements and the civil subordinations, was to operate with force on the high court of parliament. All the duties and business connected with property, were considered as a burden and a disgrace to it. At first regarded as honours, they had grown into oppressions. Men wished to hold their estates with an entire freedom, and in an exemption from every care. The command from the superior, which required his vassals to march to the field, was a humiliation to their pride. The acts of civil justice encroached upon their love of indolence and pleasure. A fashion prevailed to disunite all privileges from territory.

In this situation the nobles were to suffer. The power they had exercised in their counties and baronies, had been communicated to the sheriffs and King's judges.

ges. The jurisdiction they exerted in parliament, in consequence of their possessions and tenures, was also invaded. For the causes which were efficacious in the one case, were to operate in the other. A coldness in performing their parliamentary concerns, was to retard the deliberations and the business of the national councils. They were often to absent themselves from the regular meetings of parliament. This neglect was to be punished by fines *; and princes in disgust were frequently to withhold all notification to them of its extraordinary conventions. The same confusions, which had disturbed inferior jurisdictions, were to disfigure the high court of parliament. A similar remedy was to be applied to them; and a fresh wound was to enfeeble and to crush the usages and the spirit of feudality.

H 2

It

* Pryne, Parliamentary Writs, part iv. p. 578. 588.
589.

It appeared that privileges and offices had a more natural connection with the persons and blood of the holders, than with their estates and tenures. The *barons*, indeed, *by tenure*, could not be abolished and set aside as an order of men. But the Sovereign, that he might provide for the execution of affairs, and to support his own greatness, was to call to parliament many nobles, by particular mandates; and to require, in this form, the attendance of other tenants in chief, whose abilities deserved the distinction. The right of sitting by tenure was gradually to be forgot; and *barons by writ* had thus a beginning. When a writ, however, called to the great council a person who was not a baron by tenure, the nobility was not conferred, unless he was actually to assist as a Peer. A method of creation into the peerage, more compleat and decisive, was, of consequence, to follow this invention. *Letters-patent* were thought of, and conveyed a peerage
to

to the heirs of the receiver, though he was never to take his seat *.

The dignity of the earl, like that of the baron, was also to undergo alterations. It was to be disunited altogether from land and office. It escaped out of the system of fiefs; and, yielding to the more cultivated maxims of refining times, became titular and patrimonial.

Thus, the peerage was to advance from being territorial to be personal. It was separated from tenure and land, from military service, and feudal jurisdiction. It was confined to its proper and peculiar purposes, and acquired that stability, without which no institution can approach to perfection. The union of distinct employments, in one class of men, which is una-

H 3

voidable

* Whitelocke, Notes upon the king's writ for choosing members of parliament, ch. 32. 41. Selden, Tit. hon. part ii. ch. v. Blackstone, Commentaries, book i.

voidable in rude times, was infringed. Divisions were made in business and affairs. And society was to assume that simplicity which is the result of intelligence.

These changes, like those in the inferior courts, were of the highest importance; and, while they added to the influence of the sovereign, they were also to promote the liberty of the subject, and the greatness of the state. [Y].

But, while the condition of the nobility underwent variations, the state of the tenants *in capite* could not but submit to innovation. These tenants might possess any number of fees whatever; and all of them, down to the possessor of a *single fee*, might advance in person to the parliament. But this distinction did not extend to the proprietors of the *fractions* of the royal fee. [Z].

There

[Y]. NOTE XXII.

[Z]. NOTE XXIII.

There was thus an order of men between the nobles and the people, whose privileges, estates, and number, rendered them respectable and powerful. From their inferiority to the nobles, and in consequence of the advantage they yet possessed, in common with them, of attending in the great councils of the nation, they obtained the appellation of *the lesser barons*. [A A].

The tenants *in capite*, or *the lesser barons*, felt strongly the inconveniencies of tenure ; and they wished, not less anxiously than *the greater barons*, to possess their estates without restriction or service. Beside the indolence, the vanity, and the passions which influenced them in common with these, they were oppressed in the growing luxuries of society. The fees or estates they enjoyed, did not correspond with the dignity of their rank as legislators. And, a-

H 4

midst

midst all the duties to which they were bound, they were to account their attendance in parliament the most burdensome.

In the mean while, they were increasing in numbers. Coheirship and partitions divided large estates into small ones. The sovereign, from a principle of policy, as well as from motives of favour, was to admit the alienations of territories. Baronies, and honours, and lordships, were to be broken down, and to go in parcels to a train of proprietors.

Improvements are slow, and take not effect till the evils they suppress are insupportable. The disgusts of a duty, which was expensive beyond the measure of their wealth, the difficulties attending the convention of men averse from business, and unacquainted with it, and the tumult and distraction inseparable from a motley multitude, did not immediately produce any
statute

statute to adjust the condition of the tenants *in capite* ; and, with a due consideration of their rights, to with-hold them from advancing in person to the parliament. They continued to assemble with more or less punctuality, till the reign of James I. This illustrious Prince, whose views were deep and liberal, issued an ordinance, which permitted them to withdraw their personal attendance in parliament, and authorised them to appear there by a representation. Every county was to send two or more commissioners, in proportion to its extent. And such was the origin of *the knights of the shire*, or of the *representatives* of the tenants *in capite*. [BB.]

I am now to speak of the *burgesses* ; and it will surprise many readers, when I affirm, that they were the true and the ancient *commons* of the kingdom. It has been usual,

usual, indeed, to represent the boroughs as in a state of uniform and entire wretchedness and misery, from the earliest times till the establishment of communities and corporations in the twelfth and thirteenth centuries. But, though no conclusion in the history of the European kingdoms has been insisted upon with greater vehemence, there is none which is more untenable.

The feudal institutions were founded in freedom, and had freedom for their object. The connections of superior and vassal in their origin, and during a long period of time, were tender and affectionate. They acknowledged the same interests, and were animated by the same passions. Their cordiality was extreme; and the incidents of tenure, forming a train of mutual offices and reciprocal attentions, fostered and prolonged their intercourse.

In this condition of affairs, the individual and the subject were fortunate and happy. The vassals of a superior constituted his strength and importance. They added to his magnificence in the seasons of peace. They were his power in the seasons of hostility. And he secured and maintained their attachment by kindnesses and liberality.

But, when the customs, and usages, and situation which had given existence to the feudal institutions, were decayed and altered, the institutions themselves were assailed with violence. Selfishness and commercial ideas could not accord with the generous principles of the Gothic and the Celtic manners. In a situation which was not fitted for the feudal association, it was to be agitated in an unhappy direction. The spirit of cordiality which bound together the greater and the lower ranks of men, died away. The superior was to consider

consider the possessions of the vassal as depredations from his domain. The vassal was to be disgusted with the pride and the claims of the superior. The incidents of tenure, which had promoted happiness and friendship, were to become sources of grievance and oppression. A general dissatisfaction pervaded all the orders of the state; and society, which before had been tranquil and secure, was now deformed with frauds, suspicions, and cruelty*.

In this melancholy condition of manners, the inhabitants of the towns and boroughs were to languish under oppression. The sovereign and the nobles, with whom they were connected in a feudal dependence, treated them with a destructive rigour. Tallages, in a variety of forms, were imposed

* This distinction in the history of the feudal association I have treated at large in another work. See *A View of society in Europe in its progress from rudeness to refinement*, book ii.

posed upon them. The privileges they had possessed were usurped in a great measure, and insolently held out to them as objects which they might purchase. Fines and compensations were extorted for any new rights and advantages that attracted their attention. Methods of vexation, and claims of tribute or impost, were multiplied. Their liberty and happiness were converted into abjectness and dependency. [C C].

The spirit of refinement and commerce which, by corrupting the purity of the ancient manners, had produced this state of wretchedness, was to compensate for it. The boroughs and towns which it had reduced to be low and abject, were to be lifted by it to greatness. They signalized themselves by their manufactures and trade. They increased in riches. Princes perceived all the advantages to be derived from industry,

[C C]. NOTE XXVI.

dustry, and encouraged it. Cities obtained their enfranchisement from favour, or with money. Charters of corporation and community became frequent. The indolent grandeur of the feudal times gave way to the fermentation and activity of business. Commerce opened its sources of wealth, and the towns were exalted to their state of greatest splendour.

These distinctions characterise the history of towns, and may be employed to contradict the strong affirmations of the writers for prerogative. While it is conceived that the towns were in slavery from their origin till the age of charters of community, it is inferred, that they could not be represented till this period. On the foundation of a supposition which, instead of being supported by history, is contradicted by it, a fanciful and confident conclusion has been made. It was the breaking down of the feudal system by the growing

ing influence of property and commercial ideas, that subjected the towns to oppressions. But, long before these oppressions were exercised, they had enjoyed the full freedom of the system. [D D].

In the first period of the history of towns, they were represented in parliament, and were proud of this privilege. In the second period of their history, they continued to be entitled to this greatness; but, in some instances, finding it to be burdensome, neglected or renounced it. In the third or last period of their history, it was to be ascertained with precision, and courted with anxiety.

Thus, the spirit of fiefs points to, and illustrates the propriety and the antiquity of the representation of the towns. But, while it suits the train of thinking employed

dustry, and encouraged it. Cities obtained their enfranchisement from favour, or with money. Charters of corporation and community became frequent. The indolent grandeur of the feudal times gave way to the fermentation and activity of business. Commerce opened its sources of wealth, and the towns were exalted to their state of greatest splendour.

These distinctions characterise the history of towns, and may be employed to contradict the strong affirmations of the writers for prerogative. While it is conceived that the towns were in slavery from their origin till the age of charters of community, it is inferred, that they could not be represented till this period. On the foundation of a supposition which, instead of being supported by history, is contradicted by it, a fanciful and confident conclusion has been made. It was the breaking down of the feudal system by the growing
ing

ing influence of property and commercial ideas, that subjected the towns to oppressions. But, long before these oppressions were exercised, they had enjoyed the full freedom of the system. [D D].

In the first period of the history of towns, they were represented in parliament, and were proud of this privilege. In the second period of their history, they continued to be entitled to this greatness; but, in some instances, finding it to be burdensome, neglected or renounced it. In the third or last period of their history, it was to be ascertained with precision, and courted with anxiety.

Thus, the spirit of fiefs points to, and illustrates the propriety and the antiquity of the representation of the towns. But, while it suits the train of thinking employed

ed in these papers to give a peculiar force to this reasoning, it may be proper to confirm it by other arguments and facts; and this business will be the subject of a particular article or illustration. It will appear that history offers its testimony to the same purpose; and that the laws of our nation have included the boroughs in their description of the constituent parts of our parliament. These evidences have separately a weight that is respectable and powerful. When taken in connection, and put together, they are not to be resisted. They mark out and peculiarize the *burghesses* as the true and the antient *commons* of the kingdom. [E E].

From this detail, it is to be concluded, that the national council or the parliament was to consist, in very antient times, of the sovereign, the nobles, the tenants *in capite*,

or the lesser barons, and the burgesſes ; and that, from the age of James I. it was compoſed of the Sovereign, the nobles, the knights of the ſhire, and the burgesſes.

In this laſt condition, the commons were in their higheſt rank of political greatneſs. And the increaſing wealth which was to flow to the people from the commerce of land, and the advantages of trade, could not but add to their importance. The wants of the Sovereign and of government multiplying with riches and luxury, ſerved, at the ſame time, to augment the attention which was paid to them. They were conſequential from their natural, their inherent, and their acquired privileges ; and they were courted for the ſupplies they could furniſh.

Till the Union of the two Kingdoms, the commons of Scotland continued to meet in the ſame houſe with the ſovereign and the

I nobility.

nobility. They never assembled by themselves ; and it is perhaps to the want of this distinction which they might neglect from pride or pertinacity, and to the more limited commerce of their nation, that, though, they were considerable and eminent, they never attained that elevation and grandeur which have distinguished and immortalized the commons of England.

In connection with our parliaments, there grew up ' the Lords of the Articles ; ' an institution which has exercised the prejudices, rather than the candour of our historians. This council does not go back to an earlier age than that of David II. It was a committee of the three estates, and prepared matters for the discussion and remark of the parliament. No motive of adding to the royal authority had contributed to its rise. For each estate was interested in the election of its own representatives in this council. The public emolument,

ment, and the dispatch of business, were its real and productive causes. It continued, accordingly, to consult the national liberties and honour, till a late æra in our history. It was not till the tyrannical and insolent domination of Charles I. that the freedom of its election by the estates was invaded. It was not till this period that its original purity was tainted; and that it condescended to be a treacherous instrument to circumvent the constitution, and to betray and to oppress the people.

In this melancholy and disgraceful condition, the Lords of the articles were not, and could not be permitted to exist long. The convention of estates declared them at the Revolution to be a grievance; and King William abolished for ever their powers and authority *. [F F].

I 2

CHAP-

* Acts of the meeting of the estates, an. 1680, cap. 18.
Acts of K. Will. and Mary, an. 1690, cap. 3.

[F F]. NOTE XXIX.

CHAPTER VI.

The Union of the Crowns of England and Scotland. Its Political Consequences. The Decline of Liberty in the Scottish Constitution. The Spirit of Government till the Revolution. The Advantages of the Revolution. The Union of the two Kingdoms. The British Constitution. The Heritable Jurisdictions. The Abolition of Fiefs.

WHILE the feudal institutions were hastening to extinction, the Scottish Princes were advanced to the throne of England, and the two crowns were united. But, amidst the general and important advantages produced by this coalition, there was a necessary mixture of misfortune. The joy of the Scots in giving a King to England,

England, was repressed by the change of the seat of government. The bond which had connected all the orders of men was not destroyed, but it was no longer palpable to vulgar apprehension. It seemed that the Sovereign had confined himself to another land; and that the nobility had followed him to court preferment, and to display their consequence. The people, unencouraged by the splendours of a court, and unassisted by the expences of the nobles, were sunk in languor and in sadness.

By the Union of the two Crowns, the Sovereign acquired accessions of grandeur, and sources of influence, which enabled him to overturn and to deface that beautiful fabric of polity which had hitherto prevailed in Scotland. The poise of the constitution was, in a great measure, destroyed in consequence of the added wealth and greatness of the Prince. The nobility were not able to maintain their dignity and independence.

pendence. They could not oppose the crown with any prospect of maintaining it within its proper boundaries. The power and favour of the Sovereign were to hold out to them every thing they could wish or desire. The system of fiefs was languishing under an incurable distemper. The people were without spirit.

New and great objects of care employed James VI. He was absent from Scotland. He had a natural indolence and indecision. A remarkable neglect of its affairs was, accordingly, to characterise his reign, from the period that he mounted the English throne. His immediate successors were more ignorant of its state and concerns, and more averse from conferring upon it any lasting emolument or utility.

Charles I. who had piety without political sincerity, an affectation of justice, with a contempt of the inherent rights of humanity,

humanity, and an ambition which could not be pleased, but by overturning the freedom of our government, was to produce and to foster the calamities of civil war. But the transactions of his reign, while they polluted society with blood, were to illustrate the principles of liberty. When the man in the mask struck the fatal blow, and held out to an astonished Nation the head of their Prince, it is difficult to say, whether the greatness of the event was more terrible, or more instructive. While their straining conceptions took in the idea of their own importance, they were to know the condition and the business of a King. The tide, which, for some time, had run towards despotism, found a bank to stop its progress. The haughtiness of the prerogative was humbled before the majesty of the people.

Charles II. was not sufficiently instructed, by the sufferings and the fate of his predecessor,

cessor. His own misfortunes, and those of his family, had sunk deeply into his heart, and gave encouragement to the tyranny of his nature. A principle of revenge mingled itself with the prejudices of his education; and, during his whole reign, he is to be regarded as an enemy to the nation which he governed. Scotland was to feel every thing that is most unjust and humiliating. The use and dignity of parliaments were despised and superseded. They lost their independence. The Lords of the articles were the prostitutes of the court. A commissioner and council were to exercise the authority of government, and to insult and terrify the people. The sources of public law were corrupted. The senators of the college of justice were the flatterers, and the creatures of the ministry; and, acting in the double capacity of judges and jury, the property of the nation was at their disposal *.

But,

* Acts of the estates of Scotland, an. 1689, cap. 13.

But, while the spirit and forms of the ancient government were invaded, and while the civil rights of the people were objects of mockery, the freedom of religious principle was also attacked. The most retired and private sentiments of men were to suffer violation. Every art was employed to divide the protestant interest, and to give countenance and encouragement to popery. A tyranny, extensive as well as cruel, was about to strike deeply its roots into the soil, to lift up its head, and to threaten defiance.

The obstinate bigotry of James VII. awakened and roused into action the indignation and the valour of his subjects. The Prince of Orange opened his mind to ambition. A deep sense of civil and religious liberty, of which the value had been fully unfolded amidst scenes of rigour and injustice, pervaded every order of the state.

The

The Revolution gave a beginning to a happier train of events.

By 'the claim of right,' and 'the offer of 'their crown to King William and Queen 'Mary,' the people of Scotland were to recover their constitution. The independency of parliament was restored; the integrity of justice was respected; the freedom of the reformed religion was supported. Men finding a security and protection in their persons, their estates, and their opinions, advanced in refinement and civility. They were forward to cultivate the arts, to extend their commerce, and to enjoy the happiness of their condition *.

But the Revolution, with all its advantages, was not calculated to secure a permanent prosperity to Scotland. The immense addition

* Acts of the estates of Scotland, an. 1689, cap. 13 and 18.

dition of power, which had been given to the Sovereign by the Union of the two Crowns, rendered him superior both to the nobles and the people. It communicated an influence, which might be employed efficaciously for the purposes of oppression. For it was to be met and encountered with no proper check or controul. The nation must have yielded entirely to the royal prerogative, or have risen in arms to vindicate its independence. If it stooped to a tyrant, it was to suffer every thing that is most abject; and, if it sought to try its strength in the field, it might acquire a temporary renown, but had the certain prospect of being overpowered by a superior force, and of being reduced to be a province of England. An event of signal utility counteracted the dangers of its situation. This event was the Union of the two Kingdoms.

It

It is not my present province, and I stay not to inquire into the causes of the most important transaction in the history of Scotland. Its effect was an immediate communication of the political privileges and securities of England. An inseparable connection was formed between the two kingdoms. Scotland was to experience and to augment the happiness, the glory, and the stability of England. They were to be constant companions in prosperity and in misfortune. And, when England is to perish like Carthage, Sparta, and Rome, its sister nation will prolong the struggle, hold the fortunes of the victor in suspense, and exert, in extinction and death, that elevation of character, and that disdain of a master, which distinguish and ennoble the revolutions of her story.

The Union of the two Kingdoms, into which the English entered with so much facility, and the Scots with so much reluctance,

tance, was yet of infinitely higher advantage to the latter than to the former. It conferred upon the Scots nearly an eleventh share of the legislature; and they were to bear less than the fortieth part of the public taxes*.

Sixteen Peers were to represent, in the parliament of Great Britain, the body of the Scottish nobles. They were to be elected by the free and independent voice of this body; and, while sixteen of its number were to obtain a distinction so eminent, the order itself was, in every other respect, to be entitled to the privilege of the British peerage. The people or commons of Scotland were to be represented by forty-five members. Its counties were to elect thirty of these; and fifteen were to be sent by the royal boroughs†.

But,

* Act of the Union, art. 9.

† Act of the Union, art. 22. 23.

But, while this weight of representation was to guard and to defend the Scottish nation, it was to be upheld and secured more effectually by that balance of powers in the constitution of Great Britain at large, of which the object is the promotion and support of political order and liberty. Scotland has much to hope from its own representation; but, if I judge rightly, it may confide more securely in the democracy of England.

The superiority of the Scottish Sovereign over the other branches of the Scottish government, created by the Union of the two Crowns, was corrected at the Union of the two Kingdoms. The importance which the system of fiefs served to continue down to the Scottish nobles, was reduced within limits which were to correspond with the advancing spirit of commerce. Their right of acting and voting individually in parliament, the most illustrious of all the distinctions

tions they had ever possessed, was taken from them, and committed to representatives. By what the nobility were contented to suffer and to lose, the people were to gain. And the best interests of freedom, and justice, and trade, were consulted, established, and maintained.

There was yet, notwithstanding these improvements, a source of misery and oppression in the government of Scotland. While the feudal institutions were labouring under disease, and the powers in connection with land were giving way to regular courts, the *heritable jurisdictions* could not be affected, in the natural progression of events, and were necessarily to remain. The act of the Union of the two Kingdoms reserved them, accordingly, to their holders, as rights of property *.

The

* Art. 29.

The dignity of the national courts, and their utility, were alike wounded by the partiality and the weakness of tribunals, in which private men were to judge and to act. It was infinitely disgraceful, that, at this late hour, any offices of justice should go in succession as an inheritance, with no reference to the talents and the inclinations of the holders; and that these, as disposed or moved by indolence, incapacity, or avarice, might let out and delegate the exercise of their powers. When private men were to give that protection which ought to flow from the government, the state was to exhibit a feebleness and imperfection. While the people perceived not, with uniformity, the hand of administration in the favours which were to excite their gratitude, and in the punishments which were to teach them to reform, the union, as well as the affection which ought to prevail between the Sovereign and the subject, was invaded. And it leads us to conceive, in

a very striking degree, the obstacles which were opposed to the Union, when we reflect, that the statesmen who directed that great transaction, did not dare to apply a remedy to abuses so wanton and so calamitous.

It was not till the reign of George II. that these grievances, and this disgrace, were to disappear. The *heritable jurisdictions* being reserved as a property, it was remarked, that their holders might part with them for an equivalent. One hundred and fifty thousand pounds bought back to the nation the justice which had passed away from it. The proprietors retired into the station of simple individuals; and the supreme courts were to possess unimpaired those powers, and that dignity and independence, which a great nation had a title to bestow upon them, and which their pride and honour are interested to sustain*.

K

The

* 20 Geo. II. cap. 43.

The time was now come which was to terminate, forever, the career of the feudal institutions. The venerable oak which had expanded its branches so widely, and carried its aspiring summit to the skies, was to be stripped of all its honours, and bowed down to the earth. When the *heritable jurisdictions* were taken away, a particular act was also finally to abolish the *tenure* of all lands by *ward-holding* or *knight-service*, and its train of *incidents* or *casualties* *. This memorable law was to deposit in its grave the skeleton of that prodigious system, which had risen to so great a height, which had endured for so many ages, and which had known so much glory and mischance, so much stability and confusion.

P R O O F S,

* 20. Geo. II. cap. 50.

P R O O F S,
ILLUSTRATIONS,
AND
CONTROVERSY.

Suo quisque judicio et homines diligere aut adversari, et res probare aut improbare debet, non pendere ex alterius vultu ac nutu, nec alicui momentis animi circumagi.

LIV.

P. L. O. F. S.

POSTALIONS

POSTALIONS

*Opinions concerning the Introduction of the
Feudal Law into Scotland.*

A Compilation of statutes, entitled, *Leges Malcolmi*, and supposed to contain the laws of Malcolm II. is the foundation upon which the notion is built, that this Prince introduced the feudal customs into Scotland. That this code, however, does not belong to Malcolm II. is affirmed by Sir Henry Spelman*. He refers it to Malcolm III.; and my Lord Kaimes has adopted his conjecture †.

In this collection, it is said, in express terms, that ‘ King Malcolm distributed all

K 3

‘ the

* Treatise of feuds and tenures, ch. 14.

† Essays concerning British antiquities, Ess. 1.

‘ the territory of Scotland to his vassals, and
‘ reserved nothing to himself but the royal
‘ dignity, and the Mute-hill * of Scone.’

It is added, that, in return for this generosity, and for the support of the kingly dignity, his nobles granted to him the *ward* and *relief* of the heir of each baron.

These transactions have a singular aspect. Before Malcolm II. or Malcolm III. could distribute all the territory of Scotland, it was necessary that they should be invested in it; and, at a period when it is held, that the feudal system was unknown, this idea could not be conceived. These laws which gave away all Scotland, intimate the great maxim of feudality which supposes the Sovereign to be the proprietor of all the landed property of the kingdom. They express, in plain language, the existence of fiefs;

* The Court-hill, or the Mount where courts were held, and controversies determined.

fiefs; and yet they are appealed to as introductory of the beneficiary or the feudal law *.

It is also to be observed, that, if a liberality so weak and so profuse had distinguished Malcolm II. to whom these laws are usually imputed by our historians, or Malcolm III. to whom they are given by Sir Henry Spelman and my Lord Kaims, the fact must have appeared in the clearest manner from the consequent poverty of

K 4

the

* The words which describe this transaction are as follows.

1. Dominus Rex Maleolmus dedit et distribuit totam terram regni Scotiae, hominibus suis.
2. Et nihil sibi retinuit in proprietate, nisi regiam dignitatem, et montem Placiti, in villa de Scona.
3. Et ibi omnes *barones* concesserunt sibi *wardam*, et *relevium*, de haerede cujuscunque baronis defuncti, ad sustentationem Domini Regis. *LL. Macolmi*, cap. 1.

I have sometimes thought, that the compiler of these regulations meant to allude to the establishment of *knight-service*, and not to the *introduction* of the feudal law.

the crown. But of grants of crown-lands in posterior times, there is a profusion of evidence.

Thus, no conclusion is, with any propriety, to be drawn on this subject from these laws. And it ought to be remembered, that their authority, in general, is suspicious, and not to be implicitly relied upon, when unsupported by other monuments of history *.

But the bold game of giving away the crown-lands, in which my Lord Kaimes engages Malcolm III. who might, on this foundation, establish the system of tenures, is not even to be defended, though the reasoning now employed, and that in the text, were without force. ‘ This measure, ‘ the most politic, and of the greatest fore-
‘ cast

* Lord Hailes, Inquiry into the authenticity of Leges Malcolmi.

‘cast that ever was contrived *,’ does not accord with the character of Malcolm III. This Prince was no politician. He had courage and prowess ; and his disputes with William the Norman, and with William Rufus, encouraged his high and independent spirit. But history does not preserve any traces of his legislative wisdom. He was a soldier, and his reign is full of military business ; but of all civil knowledge he was most profoundly ignorant.

It is urged, indeed, by his Lordship, as illustrative of this position, that Malcolm III. when he established the feudal law in Scotland, was influenced by the conduct of William the Norman, who, it is said, had introduced it into England. But, while it is highly improbable, that Malcolm III. ever paid any attention to this project, it is utterly incredible, even on the supposition
of

* *Essays on British antiquities, Essay 1.*

of his having done so, and of his having possessed the greatest talents, that he should have been able to achieve the task of the introduction of fiefs into Scotland. On the hypothesis, that feudality was altogether unknown till the reign of Malcolm III. and was then, for the first time, to be introduced, it is to be conceived, that the animosity of the Scots to the English could not admit of this adoption of laws, any more than the violent and peculiar nature of the laws themselves *. And, amidst difficulties

* My Lord Kaimes insists strongly on the general notion, that the Scottish laws and customs were all borrowed from England. He has this strange passage. 'When one dives into the antiquities of this island, it will appear, that we borrowed all our laws and customs from the English. No sooner is a statute enacted in England, but, upon the first opportunity, it is introduced into Scotland; and, accordingly, our oldest statutes are mere copies of theirs. Let the *Magna Charta* be put into the hands of any Scotsman, ignorant of its history, and he will have no doubt that he is reading a collection of Scots statutes or regulations.' *Essays on British Antiquities*, *Ess.* 1.

These

difficulties so insurmountable, it is to be remarked, that William the Norman, whom Malcolm III. was to imitate, did not, in fact, introduce the feudal system into England. It had prevailed in the Anglo-Saxon times; and, there are instances of feudal grants, which were hereditary and in perpetuity, before his accession to the throne of the Confessor*.

NOTE

These are bold and loose assertions; and, I conceive, they ought not, by any means, to have been hazarded. In the legislation of all the European kingdoms, there was a natural and a necessary resemblance; and this appears, in a striking degree, from a comparison of their ordinations and laws. The *Magna Charta* has many particulars, which refer to the feudal law and the feudal manners; and this law and these manners prevailed in Scotland. But they prevailed also in other kingdoms; and, upon the same evidence, it might have been inferred by his Lordship, that France, and Spain, and Germany were indebted to England for their laws and statutes.

* View of Society in Europe, in its progress from rudeness to refinement, book ii. ch. ii. and the Notes.

NOTE II. Page 16. [B].

*The Perpetuity of the Fief. Knight-service.
The Knight's Fee.*

THE charter of Malcolm IV. which confirmed his office to Walter the Steward of Scotland, and renewed the grant of lands conferred on him by David I. and which invested him in other possessions, is still extant. The following words of it deserve attention. ‘ Volo ut idem Walterus, et
‘ haeredes sui teneant, in capite omnia
‘ prænominata, tam illa, quae ipse habuit
‘ ex donatione Regis David, quam illa, quae
‘ habuit ex mea donatione; reddendo mi-
‘ hi et haeredibus meis, de illo FEODO, *ser-*
‘ *vitium quinque militum* *.’

These

* Appendix, No. 14

These words are a proof that hereditary fiefs were familiar in Scotland in the reign of Malcolm IV. And, what is more interesting, from the terms *servitium quinque militum*, they evince the usage of knight-service in this age. They may even be considered as an authority, that hereditary fiefs, and the tenure of knight-service, were known in the times of David I. And they point, of consequence, to a still earlier period for the extension of the feudal system over Scotland, in the enlarged condition of the perpetuity of the fief.

I am thus led to conceive, that knight-service might be fully established in the reign of Malcolm III. And this improvement arose, doubtless, out of the natural variations of the system. The grant under homage, and in perpetuity, of the county of Cumberland, by King Edmund, to Malcolm I. gives a peculiar strength to this opinion; and it is to be reconciled

reconciled with the genius of fiefs, their progress, and the spirit of history; all of which are wounded, when Malcolm III. is considered as the founder of the feudal law in Scotland,

In the collections of Mr Anderson, there is a grant to Walter the Steward of Scotland by Malcolm IV. which gives him lands under the service of *one* knight *. But, in the charter I have just now mentioned, the lands specified in this deed are conveyed with the exception of one manour. Other possessions also, and the hereditary office of the seneschal or steward, are granted, and the service of *five* knights is demanded.

From the circumstance that the office of the seneschal was hereditary in the age of David I. an additional weight is given to the argument, that fiefs in perpetuity were
generally

* Diplomata et Numismata Scotiae, tab. 23.

generally known, during a considerable time before this reign. For lands must have been hereditary before offices were made so.

The grant of the office of seneschal, by Malcolm IV. is in these words. 'Notum
' sit omnibus, quod, priusquam arma suscep-
' pi, concessi, et hac mea carta confirmavi
' *haereditarie*, Waltero filio Allani Dapifero
' meo, et heredibus suis, in feodo et here-
' ditate, seneschalliam meam, tenendam sibi
' et heredibus suis, de me et heredibus
' meis, ita bene et plenarie, sicut *Rex Da-*
' *vid* seneschalliam suam ei dedit et concessi
' sit.'

It may, I imagine, be inferred from this evidence, that the office of Steward was hereditary in the days of David I. And thus I am disposed to conclude, that the feudal customs had so far ripened in this period, as to be fit for being reduced into a system
or

or digest. It is, accordingly, a popular, and perhaps a well founded opinion, that the *Regiam Majestatem*, or the books of the Majesty, were compiled by the order of this Prince.

Beside the charters of Malcolm IV. which evince positively the existence and use of knight-service in Scotland, and to which I have already appealed, there is another deed of his, which gives a direct testimony to the same purpose. It is a charter, granting the lands of Rossive and Dundaf, to Radulf Frebern, to be holden ‘per servitium unius militis*.’

On the subject of the extent or value of the knight’s fee in Scotland, I have met no information. ‘We had no certain rule,’ says my Lord Bankton, ‘for the value or extent of a knight’s fee; but, in England, it,

* Anderfon, Diplom. Scot. tab. 25.

‘it was lands to the value of 20 pounds
‘Sterling yearly, in William the Conque-
‘ror’s time, which, at present, would a-
‘mount to more than a rent of 500 l.
‘Sterling*.’

The value of the knight’s fee was, it is
to be thought, equally uncertain in every
feudal kingdom. It had, in general, a re-
ference to the revenue which might main-
tain a soldier, and provide him with arms ;
but it varied, according to the customs of
particular places, and to the generosity, the
whims, and the avarice of proprietors.
English records, of undoubted authority,
furnish frequent examples of the military
fee, as consisting of twelve carucates of
land. And there are other specifications of
fees, at six, nine, fourteen, fifteen, seven-
teen, twenty-seven, and thirty-six caru-
L cates,

* Institute of the laws of Scotland, vol. ii. p. 427.

It is inaccurate to talk of money Sterling in the days
of

cates*. A carucate was a measure of land, which extended to about one hundred acres.

NOTE

of the Conqueror; and, I believe, there is no evidence, that, in his reign, the knight's fee was so high as a twenty pound land.

* Observaciones in Registrum Honoris de Richmond, p. 243.

N O T E III. Page 18. [C].

*A Distinction concerning Allodality, and its
Subjection to Military Service.*

S I R Thomas Craig, who is always instructive when he describes the feudal customs of his own times, is seldom so when he goes back into history. He has yet expressed the distinction, that an allodial estate might consist of *moveables*, as well as of *land*. ‘Allodii duo sunt genera; alterum in *rebus mobilibus* consistit; alterum in *rebus soli* *.’

He does not, however, remark the military service which was performed by such
L 2 proprietors.

* Jus Feudale, lib. 1. dieg. 9.

proprietors. But this is evident from the following laws.

‘ Statutum est, quod quilibet homo aetatis
 ‘ inter sexdecim et sexaginta annos jura-
 ‘ bit, et affedabitur ad arma, secundum
 ‘ quantitatem terrarum suarum, et cat-
 ‘ lorum.

‘ Videlicet, homo habens *quindecim li-*
 ‘ *bras terrae*, vel *quadraginta marcas in ca-*
 ‘ *tallis*, habeat equum, habergeon, capi-
 ‘ tium de ferro, ensen, et cultellum, qui
 ‘ dicitur *dagger* *.’

‘ Dominus Rex vult, quod quilibet ho-
 ‘ mo, habens valorem unius vaccae in *bo-*
 ‘ *nis*, habeat unum arcum, cum una garba
 ‘ sagittarum, scilicet, viginti quatuor sagit-
 ‘ tas, vel unam bonam lanceam †.’

In

* Stat. Wilhelmi, cap. 23. l. 1. et 2.

† Prima Statuta Roberti Primi, cap. 27. l. 4.

In the statutes, also, of James I. *, James II. †, James V. ‡, and in a variety of other laws, the military service of allodial proprietors, both of land and moveables, is fully expressed, and pointedly commanded.

It seems, that the condition of allodality continued longer in Scotland than in other nations ; and that its conversions into tenure were less frequent. The forms of this conversion are nowhere to be found ; and the constitutional effects of this peculiarity may have been important. But, amidst the fabulous fecundity of our historians, there are no materials for the illustration of this topic,

L 3

N O T E

* Parl. 1429, cap. 120.

† Parl. 1456, cap. 57.

‡ Parl. 1540, cap. 87.

NOTE IV. Page 25. [D].

The Introduction of Fire-arms into Scotland.

IT It is probable that James I. who was educated in England, was acquainted with fire-arms. Edward III. had employed them at the battle of Cressy ; and, some years previous to that event, they were known in France *.

In the reign of James II. there is a statute, which shows, that guns were beginning then to be used by the Scots in the field. The words of the legislature, which I subjoin, are remarkable on different accounts, and have

* An. 1338. Daniel, Hist. de la Milice Française, lib. 6.

have been omitted in the common editions of the statute-book.

‘ It is thocht speidfull, that the King
‘ mak requeist to certane of the greit bur-
‘ rowis of the land, that ar of ony
‘ mycht, to mak cartis of weir, and, in ilk
‘ cart, twa gunnis, and ilk ane to have
‘ twa chalmers *, with the remanent of the
‘ graith, that efferis thairto, and ane cun-
‘ nand man to schute thame. And gif
‘ they have no craft in the schuting of
‘ thame, as now, they may leir, or the
‘ tyme cum that will be needful to thame †.’

At the battle of Flowden, in the time of James IV. it is said, that there were seven culverings, of the like size and make, which were called the *Seven Sisters* ‡.

The invention of fire-arms approached slowly to perfection ; and it is curious to ob-

L 4 serve,

* Two cavities or chambers at the bottom of the barrels,

† Black, Acts, fol. 38. an. 1456.

‡ Drummond, History of the Jameses, p. 77.

NOTE IV. Page 25. [D].

The Introduction of Fire-arms into Scotland.

IT It is probable that James I. who was educated in England, was acquainted with fire-arms. Edward III. had employed them at the battle of Cressy ; and, some years previous to that event, they were known in France*.

In the reign of James II. there is a statute, which shows, that guns were beginning then to be used by the Scots in the field. The words of the legislature, which I subjoin, are remarkable on different accounts, and have

* An. 1338. Daniel, Hist. de la Milice Française, lib. 6.

have been omitted in the common editions of the statute-book.

‘ It is thocht speidfull, that the King
‘ mak requeist to certane of the greit bur-
‘ rowis of the land, that ar of ony
‘ mycht, to mak cartis of weir, and, in ilk
‘ cart, twa gunnis, and ilk ane to have
‘ twa chalmers *, with the remanent of the
‘ graith, that efferis thairto, and ane cun-
‘ nand man to schute thame. And gif
‘ they have no craft in the schuting of
‘ thame, as now, they may leir, or the
‘ tyme cum that will be needful to thame †.’

At the battle of Flowden, in the time of James IV. it is said, that there were seven culverings, of the like size and make, which were called the *Seven Sisters* ‡.

The invention of fire-arms approached slowly to perfection ; and it is curious to ob-

L 4

serve,

* Two cavities or chambers at the bottom of the barrels,

† Black, Acts, fol. 38. an. 1456.

‡ Drummond, History of the Jameses, p. 77.

serve, from the statute, their aukward state, when extended over Scotland by James V. It was not possible, in those times, to predict their future efficacy, or to foresee that battles were to be less bloody, and more terrible; and that contending states, advancing nearer to equality by the means of this military artifice, a stability unknown before was to be given to kingdoms, and a period put to those destructive and desolating revolutions, which mark the conquests of the antient world.

In the act of James V. while it is highly important in itself, there is a beautiful simplicity, that is finely descriptive of the times. Among its other injunctions, it ordains, that the guns or artillery furnished by the clergy, according to their temporal lands, were to ‘ remaine at the castell, abbay, or
 ‘ mansion of the bishoppe, prelate, or kirk-
 ‘ man, to be keiped there and left to his
 ‘ succeffoure, quha sall bee halden to uphald
 ‘ the

‘ the samin, for the defense of the realme.’
And it concludes with enacting, ‘ that la-
‘ dies of conjunct-fee and liferent, shall fur-
‘ nish effeirand to the quantity of their li-
‘ ving, for support of the barronnes and
‘ uthers landed-men in the furnishing of
‘ the said artaillarie *.’

N O T E

* Ann. 1540.

N O T E . V. Page 34. [E].

The Scots Guards, and the Scots Gendarmes.

THE first standing army in Europe was formed in France by Charles VII. in the year 1445 ; and, it deserves to be remembered, that the company of Scots guards, and the company of Scots gendarmes, owed their institution to this Prince. The knowledge of a standing force must, of consequence, have been known familiarly to the Scots in early times.

It happened, from the antient intercourse between France and Scotland, that the natives of the latter kingdom had often distinguished themselves in the service of the former. On this foundation, these companies

panies were instituted; and their fates cannot but be interesting to Scotsmen.

The *Scots guards* were called the King's archers, because they attended his person, and because they were armed with bows and arrows. Their first commander, who is recorded as a person of great valour and military accomplishments, was Robert Patillock, a native of Dundee. This company was kept up in times of peace as well as of war; and, being ardent to distinguish itself, continued in great reputation till the year 1578. From that period, the Scots guards were less attended to, and their privileges came to be invaded. In the year 1612, they remonstrated to Louis XIII. on the subject of the injustice they had suffered, and set before him the services they had rendered to the crown of France. Attempts were made to re-establish them on their antient foundation; but no negotiation for this purpose was effectual. The troops of France were jealous of their honours.

nours. The death of Francis II. and the return of Mary to Scotland, at a time when they had much to hope, were unfortunate circumstances to them. The change of religion in Scotland, and the sanctified influence of the Scots reformers, were blows still more severe. And the accession of James VI. to the throne of England disunited altogether the interests of France and Scotland. The Scots guards of France have now, therefore, no connection with Scotland but the name *.

The company of *Scots gendarmes* were also originally a part of the guard of Charles VII. and in this station they acted under other princes. It was their prerogative to take precedence of all the companies of the gendarmerie of France; and, on particular occasions, they even preceded the two companies

* Daniel, Hist. de la milice Française, liv. 10. Abercromby, Martial achievements, vol. ii. p. 287.

panies of the King's *mousquetaires*. The sons of the Scottish monarchs were the usual captains of this company ; and, after Mary's accession to the throne, its command belonged to them as a right. It was thence that James VI. made a claim of it for his son Prince Henry. This honour, and its emoluments, were also enjoyed by Charles I. and the next in command to this Prince was Louis Stuart Duke of Lennox. George Gordon, Marquis of Huntley, succeeded the Duke of Lennox in the year 1624, and took the title of captain or commander in chief when Charles I. mounted the English throne. It is not certain whether Charles II. was ever captain of this company ; but it was conferred on his brother the Duke of York, who chose rather to live and to die a saint, than to support the grandeur of his ancestors, or to perish, like a King, under the ruins of his throne. This pious and unfortunate
man

man was captain of the Scots gendarmes till the year 1667, when he resigned his commission into the hands of the French King. Since that time, no native of Great Britain has enjoyed this command *.

NOTE

- * Daniel, *Hist. de la milice Francoise*, liv. 10.

N O T E VI. Page 45. [F].

The Idea that the Princes of Scotland were Indigent.

AN author of elegant talents, and of great industry, but who is nowhere profound, has inculcated the poverty of the Scottish Kings in strong and coarse language. After the times of the perpetuity of the fief, he considers the demesnes of the crown, with the feudal casualties, and the aid, on extraordinary occasions, termed a *benevolence*, as a full enumeration of the royal riches ; and he subjoins this remarkable conclusion. ‘ All these added together, ‘ produced a revenue, scanty and precarious, which, far from enabling the King ‘ to attempt any thing that could excite the
‘ *jealousy*

*'jealousy or fear of the nobles, kept him
'in continual indigence, anxiety, and de-
'pendence *.'*

This description he gives as characteristic of the feudal Sovereign, not only in Scotland, but in every other country of Europe. That it cannot apply to Scotland, is evident from the text ; and it is equally inapplicable to any other nation.

But, even from his own enumeration of the property of the feudal princes, though it is widely imperfect, the conclusion he draws

* Dr Robertson, History of Scotland, vol. i. p. 15. edit. 1773.

What is remarkable, this author has yet asserted, that, from the times of Robert Bruce, the Scottish Kings were uniformly engaged in schemes to overthrow the influence of the nobles ; and he has actually employed himself to detail struggles between the regal and the aristocratical powers. Hist. of Scotland, vol. i. p. 38—64. See farther NOTE VII.

draws is not to be admitted. For the King's demesnes, and the feudal perquisites, were branches of revenue which were extensive and ample.

Of the King's demesnes at a given time, it is difficult, perhaps impossible, to speak with precise knowledge. But, from the peculiar attention with which they were guarded in Scotland, it is to be concluded, that its princes, instead of being perpetually in 'indigence, anxiety, and dependence,' were at no period in that situation.

An idea of the profits of the feudal casualties may be formed from the wealth they presented to the Princes of England. Simon de Monfort gave to Henry III. for the wardship and marriage of Gilbert de Unfranville, the sum of ten thousand marks, which, according to the value of our present money, was equivalent to a payment of one hundred thousand pounds. And Geoffrey de
M Mandeville

Mandeville gave to the same Prince twenty thousand marks, that he might have the *marriage* of Isabell Countess of Gloucester, with all her lands and knight-fees*. A multitude of examples of the sale of the wardships and marriages of great vassals might be added to these; and, beside the emoluments of *wardships* and *marriages*, enormous sums were drawn from *reliefs*, *aids*, and *escheats*. Now, an inference to Scotland, from the prevalence of the same usages and customs, will, I believe, be allowed, in a great measure, to be decisive. The profits of feudality, therefore, did not permit the Sovereigns of Scotland to be in want and in dependence.

The immense revenues of the princes of France and England, and of those of other countries, for a long period during the continuance of fiefs, oppose Dr Robertson's

* Madox, Hist. of the Exchequer, vol. i. p. 326. 465.

son's notion, and create a suspicion that it rests on no foundation of real history or solid evidence. Indeed, no proof or evidence of any kind is appealed to. The surprising profits and the prodigious wealth of the Norman Kings are treated by Mr Hume at some length ; and Mr Madox has entered into details concerning them, which are most minute and satisfactory *.

To my general argument, the temporary wants of particular princes form no objection ; and it is to be observed, that, when the feudal system was deep in its decline, regular modes of taxation were invented and established as foundations of revenue, both for the prince and the government.

While Dr Robertson, however, asserts the ' continual indigence, anxiety, and dependence ' of the Scottish sovereigns, and

M 2

of

* Hume, Append. II. Madox, Hist. of the Exchequer.

of the feudal princes in general, he has affirmed, that, in the feudal ages, 'pomp and splendour were unknown, even in the palaces of Kings;' and that 'it was not necessary that a King should possess a great revenue *.' Now, it seems to me, that these observations include a violation of his own description. For, with what propriety is poverty to be objected to our Princes, when riches were of no use to them? After contradicting history, he contradicts himself.

But, waving any particular notice of this inattention, I will venture to make a large concession to this writer. I will suppose, that he may apply, with propriety, to antient periods the standard of his own age. Yet, with this advantage on his side, it will not follow that the greatness of the feudal sovereigns was diminutive or little.

In

* Hist. of Scot. vol. i. p. 14.

In fact, the King's palace, and the *Aula Regis*, in the ages of which he speaks, were splendid and pompous to an uncommon degree; and there is good reason to believe, that the grandeur of the feudal royalty was such, as not only to bear a comparison with the magnificence of the present times, but in many respects to exceed it *.

The evidence of the riches of the feudal princes, and the evidence of the splendour of their palaces, are to be found every where in antient books; and, while they mutually illustrate one another, they destroy altogether the humiliating and hypothetical tenet, that the Scottish Princes were in misery and in indigence.

M 3

NOTE

* See Chapter III. sect. 1.

NOTE VII. Page 51. [G].

The meaning of Parliament in Resumptions of Royal Property. The Notion that the Scottish Princes, from Robert Bruce to James V. had been engaged in particular Designs to depress the Authority of the Nobles.

THE act of James III. which annexes perpetually to the crown the earldom of March, the baronies of Dumbar and Colbrandspeth, the castle of Dumbar, the tower and fortalice of Colbrandspeth, the lordship of Annandail, the castle of Lochmaban, and all their dependencies, is concluded in this remarkable manner.

‘ Mair-over, to the effect that this present
 ‘ statute may be the mair surely keiped and
 ‘ observed,

‘observed, it is statute and ordained, that
‘we sall give our *bodiely aith* for the in-
‘violable observation of the samin: And
‘that all and findrie our successours, Kings
‘of Scotland, sall be oblisched to make the
‘like *aith* in the time of their coronation;
‘in witnesse of the quhilkis all and fundrie
‘premisses, our great seale, and the seales
‘of the venerable and reverend fathers in
‘Christ, Bishoppes, Abbottes, Priors, togid-
‘der with the seales of our lovits, Cou-
‘singes, Earles, Lordes, Barronnes, Free-
‘holders, and Commissioners of burrowes,
‘are hereto hung and appended *.’

This proof of the anxiety of parliaments about the royal revenue, is not single and unsupported. The statute-book abounds with a variety of examples to the same purpose; and to these I have appealed in my text. In attending to them, it appeared to

M 4

me,

* Parl. 1487.

me, that the evident meaning of the resumption of royal grants, was to support the proper dignity of the crown, and to execute acts of strict justice.

But an opinion having prevailed, that, from Robert Bruce to James V. the princes of Scotland had been uniformly engaged in designs to subvert the power of the nobles, it has been thought, that the ruin of the aristocracy might be intended by the frequent revocations which were made of the royal property.

To the opinion, that these designs were real, Dr Robertson has subscribed ; and he is confident, in a particular manner, that Robert Bruce was actuated with a view of depressing the nobility, when he called upon his vassals in parliament to produce the charters by which they held their possessions. I approve his attempt to illustrate a problematical point of our history ; but I
am

am not convinced by the sense or tenor of his observations.

He expressly affirms, that King Robert's intention, in endeavouring to recall the crown-lands, which were possessed under improper titles, was, 'to check the growing power and wealth of the nobles.' Yet the crown, in those times, according to his own narrative, must have been necessitous. He makes *all* the barons, without exception, 'to start up at once, and draw 'their swords,' in opposition to the measure of King Robert. Yet King Robert was a victorious, a high spirited, an able Prince, and could not possibly be without some personal influence. In fine, he makes the resentment of the nobility to this measure, 'as an attack upon their order,' to occasion a conspiracy. Yet, it appears, that the attack was not intended against the order of the nobles, but against those of the vassalage, who, during times of confusion,

sion, had possessed themselves unjustly of crown-lands; and persons alone of this description were interested to engage in a conspiracy*.

It is also to be observed, that, in this age, a parliamentary inquiry was too artificial a method of humbling the nobility. The condemnation, too, of the conspirators by the Black Parliament, is a demonstrative evidence, that all the nobles were not offended with Robert, nor engaged in the conspiracy; for, in this case, it was impossible that King Robert could have prevailed.

These remarks, it is probable, may justify the account I have given of King Robert's revocation †. Similar views of doing justice to the crown directed the resumptions
of

* History of Scotland, vol. 1. p. 39.

† P. 46. 47.

of future princes. And, with respect to the particular designs of humbling the nobles, which Dr Robertson imputes, in succession, to our monarchs, from Robert Bruce to James V, I must confess, that I can find no vouchers from which they are to be inferred in the most distant degree. The statute-book contains repeated and consistent evidence, from which it is to be gathered, that no such designs could be formed. The impolitic and desultory conduct of almost all the princes of the house of Stuart, contradict the notion. The anxious and perpetual attention of parliaments, to support the royal wealth, contradict it. The nobles, who were so important a branch of the legislature, would not have given their consent, and appended their seals to a multitude of acts of revocation of royal gifts, and, of annexation of new property to the crown, if they had been sensible that their princes had been engaged in formal attempts to humble them.

In

In confirmation of the designs, ascribed to our princes, of humbling the nobility, Dr Robertson has, indeed, appealed to the improvements which, in different reigns, took place in jurisdiction and courts*. But these improvements are not to be accounted for by strong, or even cautious acts of royal wisdom ; and, while they served to mortify the nobility, they were also to detract from the prerogatives of our princes. Their great effect was to advance the security and the liberties of the people ; and their causes are to be traced, not in plots to ruin the nobles, but in the natural progression of the system of fiefs †.

It is true, at the same time, that the disputes of our sovereigns and their nobility were frequent and violent. But, of these, the reasons are obvious, and the most common
books

* Hist. of Scotland, vol. 1. p. 35. 46.

† Chapter iv. sect. iii.

books of our history have assigned them. They generally arose out of the events of the times. They were not plans of a long and a uniform concert, but bursts of resentment, of passion, and of revenge. To seek for subtle and insidious motives of conduct, is, however, a common practice among historians ; and the few critics who join philosophy to taste, have remarked this frailty as peculiar to those among them, who have the fewest opportunities of knowing mankind and the world. Narrators of this kind are never to make a proper allowance for the weight of present passions and present circumstances, over actors in great scenes ; and they perceive not, that, when they suspect and refine the most, they are often to take the worst measure of human affairs.

N O T E

NOTE VIII. Page 54. [H].

*Possessions of the Scottish Kings in England.
The Usage of Corodies.*

BESIDE the territory and lands enjoyed by the Scottish princes in their own kingdom, they had many fair possessions in England. But, I suppose, it is impracticable to enumerate them with precision. A few hints is all I can propose on this subject.

Concerning the claims and the property of our sovereigns in Cumberland and Northumberland, there is much in our histories. And, it is probable, that, in very early times, they had also possessions in
York-

Yorkshire. The sheriff of this county, in the fourth year of Henry II. made the following return to the barons of exchequer. 'Willelmus de Sumervill debet XX marcas argenti. Sed manet in terra Regis Scotiae in *Loeneis* *.' This return being on the business of Yorkshire, the terra mentioned in it, must have been situated there. In old writings, the *terra* of a proprietor was his *seigneurie* or *lordship*. The territory of *Loene* or *Lobene* appears then to have been a lordship of the King of Scots in Yorkshire. From this circumstance, which I mention incidentally as an illustration of the property of the Scottish princes in England, I will venture to hazard a conjecture.

William Rufus marched a powerful army against Scotland. Malcolm III. hastened
to

* Mag. Rot. 4. Hen. 2. Rot. 5. a. Everwichscira. ap. Madox, Hist. of the Exchequer, vol. 1. p. 3.

to oppose him. He *advanced with his forces out of Scotland into Lothene in ENGLAND, and there remained.* ‘These,’ says my Lord Hailes, ‘are the words of the Saxon Chronicle, which have been, and probably ever will be, the subject of fruitless controversy*.’

The territory of *Loene* or *Lobene*, and the *Lothene* in *England*, of the *Record* and the *Chronicle*, were I conceive, the same place. It had belonged to the kings of Scotland in the age of Malcolm III. and to this territory he marched his army. I add, it was for this estate, and not for *Lothene*, or *Lothian* in *Scotland*, that Malcolm IV. acknowledged himself the vassal of Henry II.

In Northamptonshire, there also belonged to the King of Scots, in the reign of Henry

* *Annals of Scotland*, vol. 1. p. 21.

Henry II. the towns and lands of Achelley, Haringworth, Fodringhey, Bosiet, Bragefield, Pedington, Drahton, Berton, Herdewich, and Preston Gileberti. This appears from records produced by Mr Madox for the purpose of proving, that several lords of English seigneuries were sometimes exempted from common amerciaments. And the King of Scots, as lord of the seigneuries just now mentioned, was not charged with the fines which had been set upon the hundreds, towns, and lordships of Northamptonshire*.

In the counties of Cambridge and Huntingdon, and in Warwickshire, the King of Scots, in the reign of Henry II. was likewise in possession of the lands, towns, and seigneuries of Stiviclea, Paxton, and Adelakeston. Different records, in the collec-

N tions

* Madox, Hist. of the Exchequer, vol. i. p. 539. 540.

tions of Mr Madox, evince these particulars *.

That the King of Scots had other possessions in England, is a matter of high probability. But where are we to search for the evidence of them? From what has been noticed, I am induced to correct a mistake, which is committed by my Lord Lyttelton. His Lordship, I believe, is seldom positive, but when he has a title to be so. He has asserted, however, that there were no fiefs in England possessed by the Scots, in the reign of Henry II. but in the three northern counties, and that, after the delivery of these counties to this Prince, he had no liegemen or vassals of the Scottish nation, but the Scots inhabiting *Lothian* †. Now, the estates and territories

* Madox, Hist. of the Exchequer, vol. i. p. 539. 540.

† Hist. of Henry II. vol. ii. p. 483. Edit. 1769.

His Lordship, it is to be observed, is of opinion, that it
was

ritories which have been enumerated, have a reference to the age of Henry II. ; and they refer to counties different from those to which his Lordship has alluded.

When the Scottish Princes were to appear in the English court, to express their homage, and to add to the dignity of the kings of England, by feudal attendance, they were allowed a *corody* or pension for their expenses. This was a rite, growing out of feudal manners, and must not be considered as an expression of meanness or servitude.

It is natural to think, that, from the reign of Malcolm I. these corodies or pensions were in use. For, beside the military service to be performed by him for Cumberland, he was to attend the kings of

N 2

England

was the *Lothian* in Scotland, which was the fief held from Henry II. A learned antiquary has examined this opinion at great length. *Remarks on the History of Scotland*, ch. ii.

England in all solemn festivals ; and, for this end, houses of reception on the road were assigned to him *.

When King Stephen, in the first year of his reign, celebrated the festival of Easter, he held a council. At this council, among his tenants *in capite*, was Henry the son of David I. He was here, it is to be imagined, as *Princeps Cumbriae*, or perhaps for the honour of Huntingdon. In this council King Stephen granted to Rodbert the bishoprick of Bathe ; and, to this charter †, Henry was a witness. That a corody was allowed upon this occasion is highly probable.

In

* Bromton, ap. Maitland, Hist. of Scotland, vol. i. p. 307.

† It was granted, ‘ audientibus et collaudantibus omnibus fidelibus, Willelmo Archiepiscopo Cantuariensis—Henrico filio regis Scotiae.’ Madox, vol. i. 207.

In the fifth year of Stephen, however, it appears, that a pension was actually enjoyed by the Kings of Scotland ; and the evidence of this corody does not describe it as a new institution. Bertram de Bulemer had allowance, at this time, upon his account as sheriff of Yorkshire, for the corody of the Kings of Scotland, ‘ in coming to, and going from the King of England’s court*.’ In the third year of Henry II. the sheriff of Devon was allowed Lxxii l. xix s. and xd. for the corody of the King of Scotland, by the Chancellor, and the Earl of Leicester †. Thus, there is positive

N 3

proof

* In corredio regis Scotiae l. viii xv s. et iii d. numero, veniendo ad curiam, et redeundo. Mag. Rot. 5. Steph. Rot. 3. a. Everwicfira. Bertrannus de Bulemer Vicecomes. See Madox, vol. i. p. 364.

† Et in corredio Regis Scotiae, Lxxii l. et xix s. et x d. per Cancellarium et Comitem Legrecestriae. Mag. Rot. 3. H. 2. Rot. 4. a. Lincoliesc. Jordanus de Blossvilla, Sheriff, ap. Madox, vol. i. p. 207.

proof, that David I. and Malcolm IV. enjoyed corodies from England.

To William the Lion a corody was allowed by Richard I. It was granted by a charter which is yet extant, and which is to be highly valued, as expressive of the fashion of these times *. And to Alexander

* Richardus Dei gratia Rex Angliae, dux Norm' Aquitan, Comes Andeg' archiepif' epif' abbatibus, comitibus, baronibus, justiciariis, vicecom' senescal' prepositis, ballivis, et omnibus ministris et fidelibus suis totius terre sue, salutem. Noverit universitas vestra nos concessisse, et presenti charta nostra confirmasse, Willielmo illustri Regi Scotiae, karissimo amico et consanguineo et fideli nostro, et heredibus suis in perpetuum, de nobis et heredibus nostris, omnes libertates et rectitudines plenarie, quas antecessores sui habere solebant, eundo ad curiam antecessorum nostrorum, et stando ad curiam, et redeundo a curia antecessorum nostrorum; Scilicet, unaquaque die, postquam de mandato nostro transierit fines regni sui verius curiam nostram, centum solidos Sterlingorum, et in reditu suo a curia nostra singulis diebus tantundem, quousque in terram suam venerit; et singulis diebus ex quo venerit ad curiam nostram, usque ad

der III. a pension of this sort was granted by Henry III, ‡.

N 4

The

ad recessum suum, versus terram suam, triginti solidos Sterlingorum, et duodecem de dominicis * gnatellis nostris, et totidem de † semenell' nostris dominicis, et duodecim sextercia vini, quatuor, videlicet, de dominico vino nostro unde nobis servitur; et duas petras cere, vel quatuor cereos, et quadraginta candelas de dominicis candelis unde nobis servitur, et duas libras piperis, et quatuor libras cinomomi; et praeterea conductus quos antecessores sui habere solebant, eundo usque ad curiam nostram, et redeundo a curia nostra, scilicet, quod Episcopus Dunelmensis et vicecom', et barones Northumbr' ad ipsum venient in finibus regni sui, et ibi eum recipient et conducent usque ad Teise, et ibi venient ad eum archiepiscopus Eboracen' et vicecom' et barones Eborum', et ibi eum recipient et conducent usque ad Episcopatum Lincoln,' et ibi ad eum veniunt Episcopus Lincoln,' et vicecomes et barones provincie, et eum recipient, et per balivas suas conducent; et sic deinceps episcopi et vicecomites provinciarum, per quas ipse transierit, quouique ad curiam nostram venerit. *Charta Richardi Primi Regis Angliae*, ap. Calendars of Antient Charters, p. 347.

‡ Madox, vol. ii. p. 202.

* Gateux cakes or wastels,

† Simnels,

The usage of corodies was common in all feudal countries ; and it was not peculiar to princes. It was usual in the different orders of superiority and vassalage, and is to be considered as an expression, not only of grandeur, but of affection*.

NOTE

* Du Cange, Gloss. voc. Conredium.

NOTE IX. Page 68. [I].

Extents. Taxes.

THE Indenture between Robert I. and his subjects, is the deed or writing from which it is concluded, that the valuation called *the old extent*, was framed by Alexander III. To Robert I. a subsidy was given, and it was to be levied ‘*juxta antiquam extentam terrarum et reddituum tempore bonae memoriae Domini Alexandri, Dei gratia, Regis Scottorum illustris ultimo defuncti* *.’ These are the words which are the authority for the extent of Alexander III.

It appears not from this evidence, that a valuation was *actually* made by Alexander
III.

* This deed is in the Appendix.

III. A valuation or extent prior to his reign, but then in use, may be alluded to. Perhaps, too, the portion of time which passed from the reign of Alexander III. to that of Robert I. was not of such a length, as that an act in the times of the former could be termed an *antient* transaction in those of the latter. Alexander came to the crown in the year 1249; he died in the year 1285; and the indenture by Robert and his subjects was executed in the year 1326. The difference of time between these Princes cannot therefore be considered as constituting a period of antiquity.

But, laying aside arguments which are only probable, it is to be remarked, that there is an explicit and clear proof of an extent, which must have been long prior to the days of Alexander. In a record, entitled, ‘*Rentale Regis Alexandri tertii vicecomitat. de Aberdene et de Banff,*’ there is this article: ‘*De thanagio de Nathdole,*
‘*secundum*

‘secundum ANTIQUAM extentam, xlix. lib. et xvi. denar.’ This evidence, which presses against *the old extent* of Alexander III. was first submitted to public observation by my Lord Hailes *.

Valuations were common in all the feudal countries. And in England, a wide variety of *old* and *new extents* are to be produced †. For the condition of different times was constantly creating a necessity for different valuations ‡.

In England, the first tax which was known was *Danegeld*. It was a contribution in its origin for relieving England from the *Danes*. It was levied by an assessment on the *Hides* of land; and this method being

* Annals of Scotland, vol. i. p. 184.

† Appendix, No. II.

‡ Regiltrum honoris de Richmond, p. 64—69. Appendix, in regist. p. 28—51.

ing employed in future taxations, the term *hidage* came to express any general aid that was taken up from the landed property of the kingdom. A *Hidage* was usually a taxation of 2 s. per hide. But, there are instances of hidages at 3 s. 4 s. 5 s. and 6 s. per hide. The hidage was extended over the *allodial* property, as well as the estates which were *feudal*. And a hide of land was, in general, to consist of 100 or 120 acres *.

After the invention of knight-service, the *scutage* was discovered, or the tax upon knight-fees. This tax was peculiar to the military tenants †. Thus, Henry II. in the third year of his reign, lifted a scutage or tax from his vassals at two marks for the knight's fee ; and in the fourteenth year

* Brady, Hist. of England, vol. i. p. 204. 270.

† View of society in Europe, in its progress from rudeness to refinement, book ii. ch. v. and the notes,

year of his reign, he levied another scutage at one mark for the knight's fee *.

Carucage was of the same import with *hidage*; but, being a Normanic term, it was not in familiar use till the age of William the Norman †. A carue of land was equal to a hide; and carucage, as well as hidage, expressed a general taxation over the whole landed property of a state. Thus, Richard I. in the year 1198, received an aid or tax of v s. from every *carue* or *hide* of land in England ‡.

In the times which preceded James I. these modes of taxation, it is to be thought, were known in Scotland. But, in the reign
of

* Brady, Hist. of England. vol. i. p. 416.

† Appendix to the register of Richmond, p. 10. Madox, vol. i. p. 729.

‡ Ricardus Rex Angliae accepit, de unaquaque *carucata* terrae sive *hyda* totius Angliae quinque solidos de auxilio. Hoveden, p. 778. ap. Rer. Anglican. Script.

of this Prince, the tax by the *pound-land* came into fashion. And it was in this method that the subsidy from the proprietors of territory was raised to pay their proportion of his *coftage* or expences while in England *.

NOTE

* Black Acts, parl. 1424, cap. 10. 11.

N O T E X. Page 81. [K].

The Leges Malcolmi.

I N the order or precedency of the officers of the crown, I have followed the 'Leges Malcolmi;' and upon their authority I have abstained from considering the *High-Admiral* as a branch of the *Aula Regis*.

A learned and acute treatise on the subject of these laws, has yet convinced me, that they are not a genuine capitulary of any Prince *. But, though they cannot be considered with the respect that is due to statutory law, and must be regarded as the work of a private, and even an ignorant compiler ;

* Inquiry into the authenticity of the Leges Malcolmi.

compiler; they may, perhaps, be employed occasionally to illustrate the manners of antient times. And, in the present case, I could find no better rule of decision.

The officers of the crown were of a high antiquity. It is probable, however, that the names of some of them are only of the age of William the Norman. This, notwithstanding, is no real difficulty. It is common, indeed, among antiquaries, to reason from the *name* to the *office*; and this source of mistake has contributed, in a particular manner, to throw an obscurity both on English and Scottish story. But, though the æra of the Norman invasion introduced a prodigious multitude of new terms and words, it is observable, that these, in a great measure, were to distinguish old and established usages.

I offer this remark to preclude a censure which may seem to affect several observations

tions which I have made; or, rather, indeed, to show that I am aware of this censure. For, there are some objections which mere antiquaries are invariably to advance; because, being perfectly fitted to their understandings, they are not to perceive their impropriety.

O

NOTE

N O T E XI. Page 82. [L].

*A Misconception concerning the Jurisdiction
of the Sovereign.*

THE revenues of the King, says the historiographer of Scotland, 'were scanty; he had not a standing army; and he enjoyed no *proper jurisdiction* *.' This picture is full, and very expressive. It is a pity that it should convey a most imperfect likeness.

I have shown, that the revenues of the Sovereign must have been, not only considerable, but even ample; and it is obvious, that the military arrangements of Scotland
were

* Dr Robertson, Hist. of Scotland, vol. 1. p. 14.

were exactly the same with those in all the feudal nations. They were, therefore, of importance. A standing army is a late invention ; and to apply the want of it as a reproach to the Scottish Sovereign in the days of feudality, is to violate the laws of history, and to judge of him by the customs of the present age.

In connection with these tenets, it is not unnatural to find the notion, that the Kings of Scotland, of old, had no *proper* or adequate jurisdiction. But I am surprised that the author should appeal, for the support of this opinion, to the very cause which destroys it. ‘ By the feudal system,’ he observes, ‘ the King’s judicial authority was ‘ extremely circumscribed *.’ The reverse of the conclusion is the truth.

It was a necessary consequence of the feudal system, that the vassals of the Sovereign

O 2

* Hist. of Scotland, vol. i. p. 16.

reign were all in subordination to him. They had all their courts; but from these appeals were competent to him. Of their own disputes he judged in the first instance, in the *Aula Regis*, to which they were suitors; and the decrees they pronounced among their tenants, might come there to be reviewed by appeal. He had thus not only a jurisdiction over the nobles, and the tenants *in capite*, but over the whole extent of the inferior vassalage *.

But, while he had this exercise of jurisdiction, it is also to be remembered, that, in the King's court, or the *Aula Regis*, the members who chiefly assisted him, were the 'officers of the crown,' who, in their separate capacities, were the great dispensers of public justice †.

In

• Chapter IV. Sect. II,

† Chapter IV. Sect. I,

In fact, as the feudal system had produced the endless claims, and the wide jurisdiction of the Sovereign, it was its decline which was to circumscribe them. And the regular courts which were established upon the fall of the *Aula Regis*, were to be a check to his powers, and to approximate to perfection the ends of government, and the liberties of the people *.

This attack, therefore, upon the sufficiency of the jurisdiction of the Sovereign, appears in a very improper light; and I am sensible, that, in derogating from it, this author is solicitous to detract also from the officers of the crown.' For he affirms, that they 'received little salary besides the fees and 'perquisites of their office†;' and he holds them out by implication as unacquainted

O 3

with

* Chapter IV. Sect. III.

† Hist. of Scot. vol. i. p. 14.

with splendour, and as ordinary persons. Yet their greatness was overgrown *; and they belonged to the prime nobility, of whose power he every where speaks in terms which are extravagant.

I am thus induced to suspect, that this historian has not attended to the *Aula Regis*, and the 'officers of the crown,' any more than to the general spirit of the feudal system itself. And I observe, that, in another performance of his, he seems to lose sight altogether of this court and these officers. It is thence, I imagine, that he describes the *Justiza* of Aragon as an officer only known to that country; and that he ventures to reason, and in a formal method, under the idea of this institution as a *Peculiarity* †. Yet the *Justiza* or *Justicia* of Aragon was an officer who was familiar
to

* Chapter IV. Sect. I.

† Hist. of Charles V. vol. i. p. 152. 339. 340. 341.

to every feudal state. Though his powers were to vary under different governments, he was every where a part of the *Aula Regis*. He was the *Justicier* whom I mention in the text. He made his appearance, not only in Aragon, but in Normandy, in Sicily, in France, in England, and in Scotland.

N O T E XII. Page 84. [M].

An Idea of Baronial Magnificence.

THE feudal nobility were exceedingly magnificent ; and there is not a more curious monument of their state and fashion than ‘ the Register of the Honour of Richmond.’ The Earl of Richmond had immense possessions ; and we may form a notion of his grandeur from the establishment of his *Guard* for Richmond castle. There were in this establishment eight places or offices ; and they are described in this manner.

Placea Ranulphi filii Roberti in castro
Richmundiae ad capellam S. Nicolai.

Placea constabularii in clauistro turris.

Placea

Placea Briani filii Alani in magna Aula
de Scoulande.

Placea Torphini filii Roberti de Manfeld,
inter coquinam et bracinam.

Placea Ranulphi filii Henrici, ex parte
occidentali de Scoulandhall.

Placea Conani filii Heliae, juxta clausū
turre ex parte orientali extra murū.

Placea Camerarii, ex parte orientali de
Scoulandhall juxta furnum.

Placea Thomae de Burgo, ex parte occi-
dentali majoris capellae ad canonicos in
muris †.

To

* Registrum Honoris de Richmond, exhibens terra-
rum et villarum quae quondam fuerunt Edwini Comitis
infra Richmundshire descriptionem: Ex libro Domesday
in thesauria Domini Regis, Fol. Lond. 1722.

To each of these places there was annexed a feudal estate to a considerable amount. Ranulph the son of Robert had six knight-fees. The constable in the Keep of the tower had six knight-fees, and a half of a knight's fee. Brian the son of Alan had four knight-fees, and a sixth part of a knight's fee. Torphin the son of Robert of Manfeld had two knight-fees. Ranulph the son of Henry had three knight-fees, and a sixth part. Conan the son of Helias had three knight-fees and a half. The chamberlain in the east part of Scoulandhall had two fees and a half. And Thomas de Burgh had two knight-fees. I call these estates considerable; because there is reason to think that these *fees*, or the greatest number of them, consisted each of twelve carucates of land *.

Few noblemen were so powerful as the Earl of Richmond, who possessed four hundred

* Regist. Hon. de Richmond, p. 26—36.

dred and forty lordships in different counties of England*. But all the nobles affected similar forms of grandeur; and the least, as well as the greatest, gave out fees and estates, which they connected with offices and peculiarities of service.

NOTE

* Observat. in Registrum, p. 237.

N O T E XIII. Page 85. [N].

*An imperfect Theory concerning the Rise of
the Jurisdiction of the Nobles. Thanet.
Thane-land.*

AFTER having treated the jurisdiction of the Sovereign, Dr Robertson describes that of the nobles. He expresses himself in this manner.

‘ The barbarians, who overran Europe, having destroyed most of the great cities, and the countries which they seized being cantoned out among *powerful barons*, who were blindly followed by numerous *vassals*, whom, in return, they were bound to protect from every injury; the administration of justice was greatly interrupted, and the execution of any legal sentence became almost impracticable. Theft, rapine, murder, and
‘ dif-

' disorder of all kinds, prevailed in every
' kingdom of Europe, to a degree almost
' incredible, and scarce compatible with
' the existence of civil society. Every of-
' fender sheltered himself under the pro-
' tection of some powerful chieftain, who
' screened him from the pursuits of justice.
' To apprehend and to punish a criminal,
' often required the union and effort of
' half a kingdom. In order to remedy
' these evils, many persons of distinction
' were entrusted with the administration of
' justice within their own territories. But
' what we may presume was, at first, only a
' temporary grant, or a personal privilege,
' the encroaching spirit of the nobles soon
' converted into a right, and rendered he-
' reditary. The lands of some were erec-
' ted into *Baronies*, those of others into
' *Regalities* *.'

Here we have *barons* immediately after
the

* Hist. of Scotland, vol. i. p. 17. 18.

the conquests of the barbarians! Yet, a *baron* was a tenant *in capite* by *knight-service*. And, from the establishment of the European states, till the invention of *knight-service*, there passed many *centuries*. These *barons*, too, had no *jurisdiction*! and yet they had *vassals*! And it was a consequence of the murders and calamities promoted by them, that *baronies* and *regalities*, with *jurisdictions*, were erected! When Montesquieu refutes the Abbe du Bos, he applies to him what the Egyptian priests said to Solon, ‘ O Athenians! ye are mere children.’

It is perfectly obvious, that the chiefs of the barbarians had both civil and criminal jurisdiction in their woods *. They carried with them these powers into their conquests; and the feudal law, arising out of the antient manners of their nations, and out of the new situations experienced by them, the chiefs were made to alter

gra-

* Tacit. de Moribus Germanorum.

gradually their condition ; and those peculiarities and innovations commenced, which characterise the nobles of Europe, under the empire of fiefs.

If mere disorders and calamities could have produced the baronial and feudal jurisdictions, they must have appeared in every nation whatever. And, it is worthy of remark, that the jurisdictions of the nobles were, in reality, one of the most powerful sources of the confusions and tumults of the middle times.

In Scotland, as well as in England, the *Thanes* preceded the *Earls* and *Barons*. The *Thanes* were military tenants of the crown ; but their estates were not divided into *fiefs*, and furnished no known or certain number of *Knights*. After earls and barons were known in Scotland, the *Thanes* died away ; for those who were possessed of *thane-land*, gave it to the crown, and took it back under the erection of earldoms and baronies.

But,

But, though it is to be conceived, that the conversion of thanes into earls and barons took place, to an extensive degree, in England and Scotland, in the times of William the Norman, and of Malcolm III. yet it was not universal. For, in the former kingdom, there are records which evince their existence in the reigns of Henry I. King Stephen, Henry II. Richard I. King John, and Henry III. *. And, in Scotland, there are authentic charters, which prove, that there were thanes in the days of Alexander II. and down to the year fourteen hundred and ninety-two †.

NOTE

* Madox, *Hist. of the Exchequer*, vol. i. p. 12. 130. 417. 659. 694. 698. 707.

† Lord Hailes, *Annals of Scotland*, vol. i. p. 27.

N O T E XIV. Page 86. [O].

*The supposed Pre-eminence of the Scottish
Aristocracy.*

THE political powers of the Scottish nobles, were consequences of the ancient manners of the barbarians, and of the institution of fiefs; and they varied with the fates of the feudal system, and with the spirit of the feudal association. They were exactly the same with those of the nobility, in all the other states of Europe.

An opinion, however, has prevailed, that their greatness was more eminent; and it has been applied to almost every part of our story, with a spirit of dogmatism, that seems to defy all inquiry. Yet, in
P fact,

fact, if this tenet cannot bear an examination, it must follow, that many writers have been busy to involve our history in uncertainty and contradiction.

The latest, and the most confident advocate, for the uncommon and extraordinary power of the Scottish nobles, is Dr Robertson; and he has been careful to enumerate those sources of high influence, which are said to have been *peculiar* to them.

I. In the nature of the country of Scotland, this historian has found one peculiar cause 'of the power and independence of the Scottish nobility*.' That a mountainous region is, in general, more favourable to liberty, than despotism, is a position which admits not of any doubt; and a noble conclusion might thence have been drawn to the rights of the people. But,

accor-

* Hist of Scotland, vol. i. p. 21.

according to the system of this author, the people were in a state of oppression and slavery * ; and his inference is only made with respect of the nobles. That the poli-

P 2

tical

* He observes, that ' the rights of the people were ' scarce ever mentioned, were disregarded, or unknown.' *Hist. of Scotland, vol. ii. p. 249.* And every where throughout his work, he is appealing to the opinion, with which he introduces it, ' that the genius of the feudal government was purely *Aristocratical.*' *vol. 1. p. 12.* With a strong love of system, he yet runs counter to it. For, the *abjectness* of the people, and the *exorbitant power* of the nobles, are tenets that cannot agree with one another. According to the nature of the feudal usages, the strength of the nobility must have rested in their influence with their followers. The people, therefore, from whom the vassalage was formed, could not be in a state of oppression. The nobles would pay attention surely to the instruments of their power. This was a respect which they owed to themselves. But, while the author often abandons his general principle, it is to be observed, that it is in itself deficient in solidity. For the genius of the feudal system was purely *Democratical.* See *A View of Society in Europe, in its progress from rudeness to refinement.*

tical advantages, however, of the nobles, received any addition from this cause, cannot be admitted. They might find an encouragement to faction, by retiring to fens, fastnesses, and mountains; but, if such places were their own, they would not distress them by plunder or devastation; and the hue and cry of the neighbouring districts collecting a defensive force, would present a barrier to oppose their incursions *. This, then, is to survey, with an unskilful eye, the turbulence of the nobles, and to mistake it for power. It is not possible that a baron, when considered as a noble, could possess any extraordinary influence, because the place of his residence was in a desert, in a marsh, or on a mountain. And the interest communicated to him in this view, when considered as an enemy

* Spelman, Gloss. voc. Hutesium. Du Cange, Hutesium. LL. Robert I. cap. 21.

nemy to his sovereign or his country, was partial, and of little consequence.

II. Another remarkable cause of the power of the Scottish nobility, it is said, 'was the want of great cities in Scotland.' And the reason of the operation of this cause, is thus expressed. 'Wherever numbers of men assemble together, order must be established, and a regular form of government instituted, the authority of the magistrate must be recognized, and his decisions meet with prompt and full obedience *.'

It is certainly very true, that men cannot exist in great towns, without order and without government. But this maxim has a very feeble connection with the matter in dispute. For, even on the supposition that Scotland had been filled with

P 3

large

* Hist. of Scotland, vol. i. p. 22.

large cities, obedient to justice, it does not follow, that the vassals of the baron were to renounce their attachment to him. And, on the supposition that the towns of Scotland were few and inconsiderable, it does not follow, that the country was without law. In fact, it contained an infinite multitude of jurisdictions. Now, the baron, in either case, might command his vassals, or tenants; but he could do no more. And what was the baron and his tenants, when in competition with the strength of the kingdom?

III. A third remarkable cause of the power of the nobility is discovered in 'the division of the country into clans.' That men who had estates from a chief, and who were connected with him in blood, would fight for him with vigour, is a truth which is illustrated by the history of every nation of Europe. 'Against such men,' it is urged, 'a king contended with great disadvantage; and that cold service which
' money

‘money purchases, or authority extorts,
‘was not an equal match for their ardour
‘and zeal *.’

The connection alluded to was an immediate result of feudal manners, and must not be held out as peculiar to Scotland. At the same time, it is to be admitted, that clanships, in some parts of this kingdom, were connected more firmly than in other states. But, though its fullest force is allowed to this circumstance, it is to be acknowledged in general, that all the troops of Scotland, as well as those in every feudal nation, felt more or less the tie of blood, vassalage, and clanhip. To reason, therefore, from a part of these troops against the whole, is to be deceived one’s self, or to have an intention to deceive. To describe the soldiers of the baron, as universally and peculiarly his friends, and to

P 4

say,

* Hist. of Scotland, vol. i. p. 23. 24.

say, or to insinuate, that those of the sovereign were regularly and merely his mercenaries, is to give a violent wound to truth and to history. In general, it may be affirmed, that every captain, under the command of the sovereign, was to marshal troops in the field, in every respect similar to those whom the factious noble was to lead out to rebellion.

A mercenary army was never any part of the Scottish constitution ; and it is observable of the author, that, while he appeals in this place to hired troops, as weak in themselves, and as a mark of the weakness of our kings, he considers them in other portions of his work as instruments of power and of dominion ; and he objects a feebleness to our sovereigns, because they wanted them *.

Nor

* ‘ Nor could the king supply the defect of his revenues by the terror of his arms. Mercenary troops
‘ and

Nor ought it to be forgot, that the national militia, or the *allodial*-force of the kingdom, was at the call of the sovereign* ; and that he might employ it with efficacy, when it was necessary for him to uphold and support the just prerogatives of the crown, or the invaded dignity of the nation.

IV. It is also advanced, ‘that the smallness of their number may be mentioned among the causes of the grandeur of the Scottish nobles.’ And the strength of this observation is brought forward in this strange fashion. ‘The power of an aristocracy
‘ always

‘and standing armies were unknown as long as the feudal government subsisted in vigour.’ *Hist. of Scotland*, vol. i. p. 15. ‘Destitute of that great instrument of dominion, a standing army, the authority of the king continued always feeble, and was often contemptible.’ p. 16. See also vol. ii. p. 246.

* Chapter ii, \

‘always diminishes, in proportion to the
‘increase of its numbers; feeble, if divi-
‘ded among a multitude; irresistible, if
‘centered in a few*.’

The exact number of the Scottish nobility, in antient times, is not known. And, whatever quickness, and strength, and sensibility may be imputed to a small body; it is clear, beyond the possibility of a doubt, that an aristocracy must be broken more easily when it consists of a few, than when it consists of many. For, to gain one or two of its members, is to destroy it.

Other marks of fragility attend this argument. For, on the supposition, that the nobility of Scotland were few, it is to be inferred, that the tenants *in capite*, who were not noble, must have been numerous. There was the greater quantity of territory

to

* Hist. of Scotland, vol. i. p. 24.

to be disposed of to them. Now, to this class of men, the author has paid no attention. Yet, they must always have been considerable from their property, their numbers, and the vassalage in subordination to them. And their weight, going as a counterbalance to that of the nobility, a multitude of them must, in reality, have been superior in wealth and influence to a few nobles. That they would naturally range themselves under the royal standard, is not to be doubted. For, if they disobeyed the sovereign, they exposed their estates to forfeiture; and the nobles had no bribes equal to these with which to allure them.

V. 'Even in times of profound peace, the Scottish nobility,' it is said, 'formed associations, which, when made with their equals, were called leagues of mutual defence; and, when with their inferiors, bonds of manrent *.'

Affocia-

* Hist. of Scotland, vol. i. p. 25.

Affociations of this kind, it is to be remembered, are common to every nation whatever, in certain periods of its history; and, though the contrary opinion is asserted by Dr Robertson, it is demonstrable, that they were still more frequent in France, in England, and in other nations, than in Scotland*. They are to be considered as proofs of the imperfection of government, rather than of the power of the nobility. And, though the baron might be strong for a time, by leagues with his equals, or with his inferiors, it is to be observed, that they were always to impair his fortune, and often to waste it altogether †; and that the sovereign, while he had opportunities infinitely greater in giving strength to his arm by similar combinations, was not exposed to the same disadvantages.

VI.

* Brussel, Usage-general des fiefs. Abbe Mably, Observat. sur l'hist. de France. Hicks, Dissert. epist.

† See a passage in the margin of the next illustration, from the *Icon Animorum*.

VI. 'The frequent wars between England and Scotland,' it is contended, 'proved another cause of augmenting the power of the nobility *.' In general, it is to be thought, that these wars had a tendency to strengthen the crown, rather than the nobles. They were to preserve the latter from factions, by calling their attention to a common enemy, and by fixing their views on the interests of the state, and its grandeur.

It is urged, indeed, that these wars produced the propriety of investing the *wardenships* of the *marches* in the barons whose estates were on the borders †. These offices, however, if they are to be considered as an augmentation of their power, are also to be regarded as a security against its abuse. And nobles, in this situation, being
answer-

* Hist. of Scotland, vol. i. p. 26.

† Ibid.

answerable to the state for their conduct, an act of rebellion was a virtual renunciation of this transitory and official consequence.

VII. In fine, the most powerful of all the causes of the grandeur of the nobility of Scotland, is held out to be the frequent minorities of its princes *. Great advantages were, indeed, opened up by this calamity to an aristocracy for encroaching on the royal authority. In reality, however, the monarchical government was never destroyed or abolished. The aristocratical form was never to establish itself. The antient polity continued uniformly in exercise and in power.

From these minorities, therefore, instead of inferring the extravagant and peculiar power of the Scottish nobles, it is to be concluded,

* Hist. of Scotland, vol. i. p. 27-

cluded, that they either never intended the destruction of the monarchy, or were unable to atchieve it. This cause of power, accordingly, is to be viewed as a striking confirmation of the weakness of all the other causes which Dr Robertson has been employed to advance and to inculcate.

But while, from a motive of respect for the popularity of this historian, and from a proper attention to my own opinions, I have touched upon each of these causes, it is now fit I should remark, in general, that several of them are actually to be referred to one head. The want of great cities in Scotland, the division of the country into clans, and the formation of associations and leagues, were all consequences of feudal manners, and are not, without an evident impropriety, to be treated as distinctive and peculiar sources of the greatness of the Scottish nobles. To promote effects into causes, is, indeed, a practice too common
with

with this historian. And here he not only commits this mistake, but holds out the consequences of a principle as in essential contradistinction to it. For he had expressly informed his reader, that he was to detail those sources of the power of the nobility which were accidental and singular, and had no connection with the genius of the feudal government *.

I must also give its weight to another general observation, which forces itself into notice,

* * The Scottish nobles enjoyed, in common with those of other nations, all the means for extending their authority, which arise from the aristocratical genius of the feudal government. Besides these, they possessed advantages peculiar to themselves; the accidental sources of their power were considerable; and singular circumstances concurred with the spirit of the constitution to aggrandize them. To enumerate the most remarkable of these, will serve both to explain the political state of the kingdom, and to illustrate many important occurrences in the period now under our review.' *Hist. of Scotland, vol. i. p. 21.*

notice, and which seems to strike at the foundations of all that is advanced by this author. In considering the political condition of a feudal kingdom, we ought never to lose sight of the action of the different orders of men, and of the check they mutually gave to one another. To regard the nobility as uniformly the enemies of the crown, is to sacrifice history to a hypothesis. It is equally so to describe them as peculiarly and exorbitantly powerful. It is no less absurd to insist forever on the regular and the settled despotism of the Prince. And it is to incur a similar censure, to enlarge on the balance of authority as constantly on the side of the people. In these cases, we forget altogether the mixed form of government which characterised all the nations of Europe, and substitute, in its place, an aristocracy, a despotism, and a democracy. If we are to seek for the truth, we must

Q

look

look to the system in all its branches and connections, and in all its variations.

Under the deepest impression of the supereminent and irresistible power of the nobles, the author, who has drawn from me these remarks, has executed a performance concerning Scottish affairs. This tenet is held out constantly, and always with pertinacity. A gaudy edifice catches the eye; and, while we are about to examine its parts, its foundations give way. ‘Fine by defect, and delicately weak *,’ it cannot wait to encounter the tempest.

NOTE

* Pope, Epistle to a Lady.

N O T E XV. Page 87. [P].

The Prerogative of Private War. Compositions for Offences. The Pleas of the Crown. Lawburrows. The slow Progress of Jurisprudence.

IT appears to me, that, before the prerogative of private war was confined exclusively to the Lords of regality, it was exercised extensively in the order of the nobility ; and that even after it had grown to be illegal, the exercise of it continued to disturb and disfigure society. The origin and the nature of this privilege are treated in another work * ; and in this place I am

Q²

to

* View of society in Europe, in its progress from rudeness to refinement, book I.

to speak of it with a particular reference to the customs of Scotland.

Before the law is a regular science, and before the magistrate acquires the knowledge and the practice of his proper powers, men must protect themselves, and engage in associations for defence and hostility. The individual who glows with resentment under an injury, if he is equal to his antagonist, will be forward to attack him; if he is superior, he will flatter his pride and revenge, by inflicting a severe punishment; and, if he is neither equal nor superior to him, he will court the strength of those with whom he is connected by relation and friendship. It was thus that our clans and families were to wage war, to deform society, and to lose subjects to the state *.

Leagues

* By a regulation in the *Salic code*, we learn, that, in very rude times, the party who, in revenge of a quarrel,

Leagues and *bands* were in Scotland the names of factions of this kind *. Men of

Q3

rank

rel, had killed his enemy, was often to affix his head in a conspicuous place near his dwelling, in order to strike a terror of his power and prowess. And, what is curious in a great degree, to take away this head without the consent of the magistrate, or of the person whose property it had become, was considered as a crime, and compensated by a fine. ‘*Si quis caput hominis, quod inimicus suus in palo miserit, sine permisso judicis, aut illius qui eum ibi posuit, tollere praesumpserit, dc. den. qui faciunt sol. xv. culp. iud.*’ *LL. Sal. tit. 69. l. 3. ap. Lindenb.*

This barbarous custom gave rise to other customs. Thus, when hunting was confined to the great, to kill a wild beast, or a bird of prey, being a pride to the Lord or the Baron, he made a parade of it, by fastening in show, to the gates of his castle, the beak of a bird, the antlers of a stag, and the head of any noble or formidable animal. There is yet a remain of this usage among game-keepers and the retainers of the rich. Trophies of this kind have moved from the doors of the palace to those of the stable. What, of old, was the pride of the master, is now that of the servant.

It

* Stat. James I. parl. 1424, cap. 30.

rank entered into them on a footing of equality, and to sustain their mutual importance. And inferior men found a place in such associations, by giving their service and force to powerful individuals, who, in return, afforded them countenance and protection *.

This

It is a pain to reflect, that there is a period of manners when the head of a man is exposed in wantonness and show, like that of a bird or a beast. It is more painful to think that such a spectacle or exposition should have the sanction of a judge; and that it must have been encountered, and seen by the common and unconcerned passenger in his walks, with as little emotion as the owlets, and hawks, and ravens, that are yet displayed in the variations of this fashion,

* Craig, Jus Feudale, lib. ii. dieg. xi.

To the *deadly feuds* of our ancestors, it has been sometimes ascribed, that the face of Scotland is so bare, and so little adorned with trees and groves; for hostile families were to waste the plantations of one another. ‘Cædem caede repensare, decorum: Incendia alternis ignibus vindicant. Nec aperto tantum Marte; insidiis, fraudibus agunt. Nihil turpe, aut ignobile, satianti oculos

† in-

This violent condition of society lasted long, and was productive of the greatest evils. The first blow which, in all countries, is given to private revenge, and private war, is the invention of fines or *compositions*. These, in their rise, were given only to satisfy the injured party, or his family. Afterwards, they are also demanded to satisfy the public for the infraction of its peace. In Scotland, it is to be conceived, that compensations of both kinds were prior to the aera of any laws which now exist; and, in those which remain, there are notices of them *. In late times,

Q 4

the

‘inimicorum malis. Et haec pestis saepe optimates ever-
‘tit; sive inter ejusmodi arma extinctos, sive frequentium
‘stipulatorum (nam suspectam vim inimicorum ita submo-
‘vere necesse est) sera inopia, distractisque fundis luentes:
‘Etiam quod ut plurimum regio arboribus caret, quidam
‘putant illorum odiorum facinus esse; dum adversis faci-
‘bus inimicorum sylvas cremant, et privatis injuriis vasti-
‘tatem patriae faciunt.’ *Barclaius, Icon animorum, ap. Res-
pub. sive status Regni Scotiae, p. 277.*

* Reg. Majest. lib. iv. cap. 24. 36. 38. Stat. James I.
parl. 1426, cap. 94.

the fine to the private party had the title of *assythment*; and, on receiving it, the persons or family injured were to grant *Letters of Slanes*, which contained a remission of their malice, revenge, and resentment *.

Compositions are followed by the discovery, that there are some offences more *peculiarly* hurtful to the *state*; and the abstraction of these altogether from the rude interference, and the violent partialities of *private*

* The words of this remission, in the form or writ of the *Letters of Slanes*, are remarkable. ‘ We, by thir
 ‘ presents, for ourselves, and taking burden as said is, for
 ‘ give, pass over, and forever forget, and in oblivion in-
 ‘ ter, all rankor, malice, revenge, prejudice, grudge, and
 ‘ resentment, that we, or those for whom we take burden,
 ‘ in manner foresaid, have, or may conceive against the
 ‘ said A. P. or his posterity, for the crime foresaid.’
Dallas of St Martins, System of Stiles, p. 862. It is wonder-
 ful, that this form or custom should have been in practice
 in the days of Mr Dallas, whose book was published in
 the year 1697.

private men, is an immense acquisition. It was to separate criminal and civil rules. It was to teach a *public* interest to a wide extent. It made the sufferer, in the moments of his anguish, to forget, in some measure, himself, and to sacrifice a part of his selfishness for the general tranquillity. It was the *King* who was now to complain, and to prosecute in the behalf of the society. This beautiful privilege was to prepare the way for the most important improvements. Such is the origin of what, in England and Scotland, were termed *the pleas of the crown*.

This invention was to strike at the root of private wars. When individuals were to acknowledge, that the community had a momentous concern in the punishment of crimes and misdemeanours, they were disposed to leave them to the cognisance of the magistrate. They were to observe,
that

that the great law of society is to respect its peace.

To enforce this rule, ordinances were made in a variety of forms. Abuses, which had grown out of the prerogative of private war, were abolished or restrained. And, as the nature and consequences of crimes came to be understood, the individual was taught not to engage in hostility himself, but to rely with confidence in the protection and the power of the government.

James I. a Prince of the greatest talents, was to enact, that no man should take the liberty to make war against another *. What was an ordination still wiser, he declared, that a party who dreaded harm and violence, might apply to a judge, who was to procure *security* to him from his enemy against deeds of outrage and war †. This
was

* Stat. James I. parl. 1424, cap. 2.

† Stat. James I. parl. 1429, cap. 129.

was the origin of *Letters of Law-burrows* *. *Burrow* was the *pledge* or *surety*, that the *law* should not be broken †.

It was a regulation of James II. that no *subject* should seek any *security* from a *subject*; but that the king's peace should be an *assurance* to all men ‡. James III. prohibited all courts of *guerra* or war §. And James VI. ordained, that no man should accept the *assurance* or protection of thieves, or pay them *black-mail*, under the pain of death and the escheat of moveables ||.

It

* Dallas of St Martins, System of Stiles, p. 447.

† Spelman, Gloss. voc. Burghbrech.

‡ Stat. James II. parl. 1449, cap. 12.

§ Parl. 1476, cap. 70.

|| Stat. James VI. parl, 1567, cap. 21.

I suppose, that, originally, the present alluded to in this statute, was called *Black-mail*, because it was a payment in cattle. It was afterwards a payment in corn, and then in money. In England, of old, it was usual to
give

It is, by a very gradual step, that laws are to produce their proper consequences, and to be a lasting benefit to society. The views of the legislature go, in general, beyond the ideas of the people. They must be inculcated and pressed in a thousand shapes. But the privileges, protections, and rights, which are necessary to the happiness of man, are never, perhaps, to attain their full proportions and maturity. They struggle for ever with the imperfections of the individual; and, in ages of civility, as well as of rudeness, they are to suffer from the prejudices and the imperfections of the legislature itself. In nature nothing is pure
and

give out lands to tenants, partly for money, and partly for provisions; and the payment in kind, got the name of *the Black-mail*. Tributes, too, under this appellation, were paid respectively to English and Scottish chiefs, on the borders of the two kingdoms, by the poorer inhabitants. They were thence protected during the incursions and devastations of these barbarians. *Spelman, Gloss. voc. Black-mail.*

and without a mixture. Wisdom and folly, virtue and vice, knowledge and ignorance, liberality and superstition, are all jumbled together, and fill up the bright and the melancholy picture of human affairs.

N O T E

N O T E XVI. Page 89. [Q].

The Vavassor.

THE vassal of the tenant *in capite*, was called a *vavassor*. He was the vassal of a vassal. Those who held of the vavassor, were named *valvasini*; and this last term had a reference to every thing that is most mean in the scale of feudality *. The importance of the vavassor, I conceive, was to be ascertained by the distinction of the person from whom he held, and from the quantity of the knight-fees which were conferred upon him. Yet on this subject authors have been doubtful.

Sir

* Du Cange, Gloss. voc. Vavassores. Craig, Jus feudale, lib. 1. dieg. 12. Skene de verb. signif. voc. Sub-vassores.

Sir Henry Spelman lays it down, that a *mesne* tenant, who had more than a single knight's fee, was called a *vavassor*, which he thinks was a degree above knights; 'yet,' says my Lord Lyttelton, 'we generally find that name applied to any vassal who held a military fief of a tenant in chief of the crown *.'

With Sir Henry Spelman, the learned author of the admirable Commentaries on the laws of England, seems in part to agree, when he considers the vavassor as next in dignity beneath a peer; but he expresses himself with hesitation, and does not allude to the idea, that the vavassor was *necessarily* to possess more than a single knight's fee †.

In relation to the fees, or the property of the vavassor, it is very clear, that he might possess more or less, in proportion to his merits, and the will and generosity
of

* Hist. of Henry II. vol iii. p. 83.

† Blackstone, book 1. chap. 12.

of his superior. But is it to be thought, that the tenant of the vassal *in capite*, took his rank immediately after the nobility, and before the dubbed knight? Was he of more consideration than the person from whom he derived his importance? This is impossible.

A difficulty started by such eminent men, ought not to have been abandoned by them. I will venture, notwithstanding, a conjecture on this topic.

Let it be observed, that the nobility had sub-vassals, as well as the simple vassals *in capite*. And let us conceive, that the term *vavassors* was applied to these; for they, too, were the vassals of vassals. Now, Bracton and antient lawyers talk of the vavassors as ‘*viri magnae dignitatis**.’ But this description could not apply to the sub-vassals of the simple tenant *in capite*. It
might

* Lib. 1.

might apply, however, to the sub-vassals of an earl or a baron. These then were the vavassors to whom the books of antient law express an allusion. These were the ‘*virī magnae dignitatis*,’ and took their rank immediately after the nobles, and before the dubbed knights.

In fact, the nobility who were the most wealthy and the most splendid, conferred grants, to a great extent, upon particular persons who were high in their esteem. And to these great tenants of over-grown subjects, the title of *baron* was often given. This, I imagine, was a consequence of the respect which was attracted to them by their riches. They had the name of *barons*, but could not appear in parliament. Thus, Richard Fitzosborn, and Thurstan de Montfort, were the barons of Henry de Novo Burgo, Earl of Warwick. The estate of the last consisted of ten knight-fees; and there are instances of great tenants of the nobles who were called barons, and who

R

were

were possessed of grants still more extensive*.

It is proper for me, however, to observe, on this occasion, that *vavassor* was peculiarly applied to the tenant of the simple vassal *in capite*, and that I have met no instance of it in an actual application to the great tenant of a great lord. I should suppose, notwithstanding, that, in very antient times, the term might be used in this sense; and, it is probable, that its use, in this sense, did not decline till the superior title of *baron* was given to such tenants, and till they wished formally to distinguish themselves from inferior *vavassors*.

NOTE

* Anderson, diplom. Scot. tab. 21. Whitelocke's notes to the writ for choosing members of parliament, vol. i. p. 310. Lord Lyttelton, Hist. of Henry II, vol. iii. p. 379. Brady, Tracts, p. 116.

N O T E XVII. Page 90. [R].

Fractions of the Fee. The Multiplicity of Little Manours. Scottish Lairds. And the Portioners of Land.

I N Scotland, there were fractions of the *fee*, as well as in the other nations of Europe. A charter granted by William the Lion, confirmed to William de Vallo-niis, the lands of Banevin and Pannomor, and bound him to hold them ‘per ser-
‘vitium *dimidii* militis *.’ And the ‘ser-
‘vitium *tertie* partis unius militis,’ is the holding in a grant of confirmation by Alexander II. †,

R 2

There

* Anderson, *Diplomat. Scot.* tab. 29.

† Anderson, tab. 31.

There were also fractions of fees, which flowed from the grant of subjects-superior. Waldevus, the son of Gospatrick Earl of Dunbar, gave lands 'pro servitio *dimidii* militis.' Richard de Moreville gave lands 'pro servitio *quarte* partis unius militis.' And Walter de Berkley granted out lands 'pro servitio *dimidii* militis *.'

The regular fractions of the fee were the eight parts, which were termed its *members*, and which had this appellation, from their being bound to perform the purposes of the grant. Of these the possessors, according to the feudal rules, had manours and jurisdiction. Hence, a beginning was given to a multiplicity of *little manours*; and hence, as fiefs died away, there was produced the infinite profusion of *Scottish Lairds*, who have so long been a subject of ridicule; and who, retaining the
pride

* Anderson, tab. 74. 76. 78.

pride of feudal times, in the midst of meanness, repress at this moment the spirit of improvement, in every county in Scotland.

From the dismemberment of the fee beyond the eight portions, into the twentieth, the thirtieth, the fortieth parts, and into fragments still more minute, there arose also, I conceive, a class of men, more numerous and more insignificant. I speak of *the portioners of land*, to be found in every Scottish village, whose harvest is half a sheaf; and who, meagre with their petty pittance, point to it with vanity, and despise the honest toils of the mechanic.

NOTE XVIII. Page 96. [S].

The Sheriff.

I Have said, that the Sheriff in his origin was appointed by the Earl, and was merely his depute. Mr Madox, I know, has contended, that the Sheriff or Viscount was uniformly in the nomination of the King, and never in that of the Earl. 'In *Anglia Vicescomes* minister erat *Regis*, nequaquam *Comitis* *.' But this notion does not correspond, either with feudal principles, or with history.

In the appendix to the Register of Richmond, there is a certain proof that the Sheriff or Viscount was in the appointment
of

* Not. ad Dial. de Scaccario, lib. i. cap. 17.

of the Earl, and to be considered as his servant or officer. It is a writ with this preamble. ‘*Alanus Comes Angliae et Britanniae Dapifero suo, et Vicecomiti, et omnibus baronibus suis Francis et Anglis, salutem **.’ The business of this deed was to renew and confirm some liberties and customs to the burgesses of Richmond.

The position, that the *Comes* or *Earl* might, of old, nominate his deputy, and that this deputy was the *Vicecomes*, is also illustrated in the *Marca Hispanica* †. And Du Cange has preserved examples of actual elections of the sheriff by the Earl ‡.

In Scotland, it is affirmed by Sir Thomas Craig, that this officer was constantly

R 4 in

* Regist. Hon. de Richmond, p. 100.

† *Marca Hispanica*, sive *Limes Hispanicus*, lib. iii. cap. xi.

‡ Gloss. voc. *Vicecomes*,

in the election of the Sovereign*. But, while his authority is made suspicious by what is now urged, it is overthrown altogether by the following evidence. Henry the son of David I. as Earl of Northumberland, employs this address in one of his charters. ‘*Henricus Comes filius Regis Scottorum, justiciariis, baronibus, Vicecomitibus, prepositis, ministris et omnibus probis hominibus suis totius Comitatus sui Northumberlandie, Francis et Anglicis, salutem †.*’

NOTE

* Jus Feudale, lib. i. dieg. 12.

† Anderson, Diplom. Scot. tab. 21.

N O T E XIX. Page 106. [T].

The immeasurable Power of the Chief Justicier. The Nobile Officium of the Court of Session.

I Am inclined to imagine, that the Court of Session, as it swallowed up the civil powers of the great Justicier, was also to imbibe a remarkable portion of the wild extensiveness of his jurisdiction.

It is well known, that the powers of this officer were exorbitant in every country of Europe. In England, many inclement acts, to the contempt of all law, were exercised by him *. And, on this subject, there
is

* Spelman, Gloss. voc. Justitarius.

is a memorable story, which is told of Ranulph de Glanville, the famous lawyer and justicier in the days of Henry II.

In the King's court at Worcester, Gilbert de Plumtun, a knight, and a man of a noble extraction, was produced loaded with chains, and accused, before the King, of a rape, by Ranulph de Glanville the justicier of England. The accusation was made with no measure of propriety; and the judge, though he knew his innocence, was desirous to condemn him. He was adjudged accordingly to be hanged on a gallows. To the gallows he was led out, amidst a concourse of spectators, who asserted his honour, and the injustice of his fate. Their clamours were disregarded; and, in the moment that the knight was to suffer, the Bishop of Worcester, a holy man, interfered, by denouncing against the executioners the Divine vengeance, and that of the Church, if they should presume to exercise

ercise their office on a *Sunday*, and on the *feast* of Mary of Magdalene. Superstition was more powerful than justice. Gilbert de Plumtun was reprieved till the next day. Henry II. in the mean time, moved with pity, and sensible that Ranulph de Glanville had been influenced by the low motives of resentment and avarice, was induced to spare his life. Yet this unfortunate man, though he did not die by the halter, was made to languish in prison, by the authority of the justicier*.

The chief justicier, says Sir William Blackstone, ‘from the plenitude of his power, grew at length both obnoxious to the people, and dangerous to the government which employed him †.’ This was to happen also in other kingdoms. The *Justicia*, or Justicier of Aragon, is compared by the Spanish writers to the tribunes of
of

* Hoveden, ap. Rer. Anglican. Script. p. 622. 623.

† Commentaries on the Laws of England, book iii, ch. 4.

of Rome, and to the ephori of Lacedaemon; and it was necessary to have a check to his authority.

In Scotland, it is to be conceived, that the excessive grandeur of the justicier was no less inclement than in other nations. His powers, therefore, in civil matters, passing to the court of session, it is not unnatural to suppose, that the extravagance of the jurisdiction he had exerted in rude times; was, in some degree, to distinguish this new tribunal.

A supereminent, a boundless jurisdiction, is claimed, in fact, by this court, has been exercised by it, and is thought to be lodged in it at this hour. I allude to the *nobile officium* of the court of session, which, carrying in its use and nature the precarious justice, and the unprincipled rudeness of a barbarous age, is not to be considered as a right, but as a deformity.

Of

Of this prerogative the offices are most extraordinary. It is a consequence of its powers, that the court of session has sustained itself as competent to judge in matters of rank and precedency. Yet these are the acknowledged objects of another jurisdiction. In questions of the peerage it has determined. Yet these are known to appertain to the house of Peers *. The *nobile officium*, then, conveys a jurisdiction which is peculiar to, and inherent in other courts.

It does more. Wherever there is a wrong, for which, it is fancied, there is no remedy, it confers a power to the court of session to interfere, to invent a rule or expedient, to judge, and to give this judgment as a precedent to posterity. This court has, therefore, in effect, an authority to make laws. Here the judicial powers usurp upon the legislative.

‘ The

* Historical Law Tracts, hist. of Courts.

‘The judges of the session,’ says an eminent lawyer, ‘may, in their inquiries into facts, direct things to be done, or steps to be taken, which neither are, nor can be demanded as a point of right *.’ They have thus an absolute and inquisitorial jurisdiction.

It has been said, that the law is a hedge and a fence around the liberty of the subject. But the *nobile officium* can overleap this hedge and this fence. It can pronounce of a law, that it is in *disuse*, or that it is improper. Yet this law may be a statute of the nation, and unrepealed †. It can
look

* Mr Erskine, Institute of the Law of Scotland, p. 44.

† Id vere nostrum jus est, quale est illud quod ex trium regni ordinum constitutionibus et statutis, accedente principis consensu, promanat, et hoc jus regni proprium est: Et acta, quae dicuntur parliamentorum, primò investiganda, quoties difficultas aliqua occurrat, ut nuper in jure Anglorum diximus. In his quid faciendum, quid fugiendum, primò inquirendum:

look with impudence in the face of an act
of parliament, and not only dispense with
its

inquirendum : Neque enim praeter ea, apud nos ullum
jus scriptum certum et stabile habemus. Sed profectò
non ea religione haec apud nos servantur, qua apud An-
glos ; ubi nemo actum parlamenti, etiam longa defuetu-
dine pene abolitum, nisi expressa postera constitutione an-
tiquatum, unquam violavit impune. Apud nos quaedam
omnino in defuetudinem abierunt : Veluti, ne liceat cui-
quam inter festa Simonis et Petri, et purificationem Vir-
ginis navigare ; ne ludo pilae majoris se exerceat ; de ve-
stibus advocatorum in parlamenti, et pleraeque similes.
Quaedam non in totum, sed pro majori parte antiquata
sunt : Quale est illud de nullitatibus per exceptionem re-
cipiendis ; quod tantum in causis regiis, et quae circa ejus
patrimonium versantur, locum habet. Quaedam etiam,
si locum habeant, ita senatus sibi subjecit, ut interpreta-
tione quò velint deducant ; quale est illud de instrumentis,
ne in rebus hereditariis sive gravibus controversiis locum
habeant, nisi duorum notariorum testimonio et signis con-
firmentur. Nam quae res magnae, quae graves contro-
versiae dicantur, sibi senatus judicium reservavit ; in quo
etiam saepe variatum vidi. *Jus Feudale, lib. i. dig. 8.*
These are the sentiments of Sir Thomas Craig on the des-
potism of the court of session.

its powers, but contemn them. No banks can withstand this torrent. It bursts every channel, and wherever it flows, it carries destruction along with it.

To urge that the *nobile officium* belongs to the court of session, as a court of equity, is to propagate a tenet in every respect frivolous. For equity has its rules as well as law, and depends not on what is called the moral sense or the conscience of particular men. It is to make a farce of all jurisprudence, and of all justice, to talk of equity as merely a deposit in the breast of a judge, and not as artificial, regular, and systematic. It is to exalt the dictates and the caprices of individuals about the wisdom and experience of ages, above evidence, authorities, and rules. It is to advance judges into despots. They are thus to be invested with a power, that is above law, and above equity. Their feelings, their capacities, their frailties, and their passions,

are made to come in the place of the principles and the impartialities of justice.

In a situation like this, the most violent fluctuations must characterise the decisions of a court. An alarming uncertainty must prevail. Judges will pronounce a decree, receive a reclaiming bill in opposition to it, alter the decree they had pronounced, and issue a new decree in absolute contradiction to it. Foundations will be laid for chicane, for delays, and for expence*.

S

Men

* Not many years ago an appeal was brought to the House of Lords from the court of session in Scotland, in a cause between Napier and Macfarlane. It was instituted in March 1745; and, after many interlocutors, orders, and sentences below, appealed from and reheard, as far as the course of proceedings would admit, was finally determined in April 1749; the question being only on the property in an ox adjudged to be of the value of three guineas. No pique or spirit of party could have made such a cause, in the court of King's Bench or Com-

Men of no virtue will be encouraged to engage in litigations. Men of probity, and conscious of their rights, will feel a painful uneasiness. They will tremble to confide their honour and their property to capricious decision, or dogmatical authority*.

This

‘ mon Pleas, have lasted a tenth of the time, or have cost
‘ a twentieth part of the expence.’ *Sir William Black-
stone, Commentaries, book iii. ch. 24.*

* Of old, in every country of Europe, the administration of justice was corrupt in the greatest degree. Solicitation and money were applied without scruple or delicacy. In Scotland, in the days of James VI. the following law was enacted.

‘ Forfameikle as it is heavilie murmured be divers
‘ lieges of this realme, that our’ soveraine Lord electis and
‘ chufis young men, without gravitie, knowledge, and ex-
‘ perience, not havand sufficient living of their awin, up-
‘ on the session, and that sum of them be themselves, their
‘ wives, or servands, takis buddes, bribes, guddes and geir,
‘ swa that justice, in effect, is cost and fault. For remeid
‘ quhairof, the Kingis Majestie, with advise of the three
‘ estates or this present parliament, statutis and ordainis,
‘ That none of the Lordes of session alreddie received, or

This *nobile officium* is a snare for the integrity of the upright senator. It is a cover for the wickedness of the senator who is corrupt. A court with this principle of action, must be arbitrary. It may invade whatever is most valuable in our rights. It is in a wild hostility with our constitution. It is a Turkish jurisdiction in a country of liberty *.

S 2

After

' to be received, nouthar be themselves, or be their wives,
' or servands, take, in ony times cumming, bud, bribe,
' guddes or geir, fra quhatsumever person or personnes
' presently havand, or that hereafter fall happen to
' have ony actions or causes persewed before them, outhar
' fra the persewer or defender, under the paine of confiscation of all their movabil guddes that dois in the contrair, the ane half thereof to be applyed to our soveraine Lord, and the uthar halfe to the reveiler and tryer of the saidis bud takeris. And farther, decernis and ordainis the said bud takeris to be displaced and deprived, *simpliciter*, of their offices quhilk they beare in the college of justice, and to be declared infamous, and als to be punished in their persones at the Kingis Majesties will.' *Statutes, James VI. parl. 1579, cap. 93.*

* The eloquent Buchanan has given his opinion of the
court

After suffering long in silence, the people will recover from astonishment to reflection. They will mature in their understandings. They will take courage from knowledge, from indignation, and from scorn. They will exclaim, in one voice, that there is nothing so equivocal, so insolent, so loose, and so tyrannical, as the *discretion* of a judge.

This subject is new ; and yet we are in the close of the eighteenth century. These
cir-

court of session. His words are memorable. ‘ *Omnium civium bona quindecim hominum arbitrio sunt commissa, quibus et perpetua est potestas, et imperium plane tyrannicum, quippe quorum arbitria sola sunt pro legibus.*’
Rer. Scot. Hist. lib. xiv.

It has been reproached to this cultivated scholar, that he gives his sentiments with too much liberty. I am surprised that so many critics have concurred in this censure. Is there a quality in an author so honourable, so useful, as that of expressing what he thinks? Is it proper that science and learning should be put in prison, and dishonoured by confinement and fetters? Miserable is that nation where literature is under any form but that of a republic.

circumstances might be urged as a proof of the slow progress of Scottish jurisprudence. But I am more interested to point them out as an argument of the despotism of the *nobile officium*, which I have presumed to treat on the principles of public law. Arming itself with its terrors, it has not only supported its existence so long, but maintained an awfulness and dignity. Perhaps I have taken advantage of the first moment, when it is not actually a *crime* to speak of it with freedom.

NOTE XX. Page 106. [U].

The Torture.

THE chief justicier, who conferred its *nobile officium* on the court of session, was to bestow a more detestable gift on the court of justiciary. In the ordeals, or the trials of fire and water which were practised among the barbarians before they marched from their woods, the torture had its rise *. To the unlimited jurisdiction of the chief justicier, it was admirably suited; and when the justice-court succeeded to his criminal powers, it was to retain, and to foster

* In the *LL. Burgerorum*, which were enacted or enforced by David I. there is an allusion to a peculiar kind of torture. See *cap. 21. and Du Cange, Gloss. voc. Tumbrellum.*

foster this odious prerogative. From the justice-court, or the court of justiciary, it was adopted by the privy-council of Scotland. And it is well known, that this last jurisdiction was to exceed the star-chamber of England in every thing that is most daringly and most exquisitely profligate.

To the disgrace of humanity, the torture, as a part of our law, was to continue till the days of Q. Anne *; and with marks of atrocity which were not usual in other nations. In Scotland, the sustaining of the torture was not uniformly to justify the criminal. Upon new presumptions he might again be fitted to the rack. It might be inflicted upon persons of a tender age. It might be exercised upon women. Being restrained only by the discretion or the wantonness of judges, it might mock the natural miseries of men, and force them to

S 4

groan

* 7. Ann. cap. 21.

groan by studied and artificial agonies, while under the langours of sickness, and under the pressure and the debilities of years *. Even after sentence had been given, the object of persecution was not in security from it. The unfortunate victim, whom anguish and pain had convicted of a crime of which he was innocent, and who waited with impatience to forget a shame that was not his, in the completion of human punishment, might, before he suffered, be dragged anew to the torture, to discover his accomplices, and be mangled and torn to accuse men as innoxious as himself.

Amidst the formalities of a precaution so abominable †, the criminal, though debased with wretchedness, and execrable
with

* Sir George Mackenzie, *Laws and customs of Scotland*, in matters criminal, part ii. tit. 6. 27.

† The use of the torture in England, in old times, is illustrated by Mr Barrington. *Observations on the more antient statutes*, 3d edit. p. 80. 440. 442. It seems to have prevailed in every country of Europe.

with guilt, could yet find, in his situation, a subject for pride; and, while his eye spoke the troubled emotions of his soul, it could glance with disdain to judges insulting with gravity the dignity and sensibilities of nature and man.

NOTE

NOTE XXI. Page 110. [X].

*The King's Court, and the National Council,
or the Parliament.*

IT is remarkable, that the King's court, and the high court of parliament, are almost always confounded. My Lord Kaims inculcates the notion that parliaments were the King's *baron-courts* *. And, on this topic, the historiographer of Scotland, in his account of its internal constitution, does his Lordship, as usual, the honour to adopt his opinion †. He does not, however, appeal to the authority of this ingenious and reflecting lawyer, any more than

* *Essays on British Antiquities*, Ess. ii.

† Dr Robertson, *Hist. of Scotland*, vol. i. p. 65.

than in other places where his obligations are still greater. Sir George Mackenzie *, and other writers, had said the same thing before them. But the King's *baron-court* was the *Aula Regis*. And *Parliaments* were formed upon other and more enlarged maxims. The distinctive characters of the two courts will appear, I imagine, from what I have said of each †.

The obligation of the royal vassals, to attend the hall of the sovereign, and to be suitors to his court, did not confer upon them the privileges of legislators. Yet this, I conjecture, is the principle from which these writers would derive the constitution of parliaments. It is very clear from history, that, in the different countries of Europe, the power of the general councils

or

* The Institutions of the Law of Scotland, book i. tit. 2.

† Chapter iv. sect. i. chapter v.

or parliaments, in very antient times, was frequently exercised, even to the prejudice and destruction of kings themselves. Now, on the supposition that such courts were the King's *baron-courts*, it must follow, that the vassals of the prince might assemble in his *palace*, to controul his authority, to punish his delinquence, and to throw him down from royalty. This, surely, could not be the case.

The palace of the prince was the proper place for the tenants *in capite*, to constitute his *baron-court*, or the *Aula Regis*. But, general councils or parliaments were usually to be held in churches, abbeys, and castles.

In the King's court, we see the meetings of a superior and his vassals. In the parliament, we see the constituent parts of the state in deliberation about its affairs and prosperity. In the former, the King was a great object. In the latter, he appears with a diminished splendour.

There

There seems no point in history more obvious, than that there was a most essential distinction between the King's court, and the court of the nation, between the *Aula Regis* and the *Parliament*. Yet, I acknowledge, that, in antient books, when *courts* or *councils* are mentioned, it is often difficult to say, whether the allusion may be intended to express the former or the latter. There are, however, actual examples where the application admits not of doubt; and, in such examples, we must see and acknowledge the reality of their distinctions. Thus, *curia* is used with precision, in expressing the court of the King, as well as the court of the Nation; and the *magnum concilium* is made, to peculiarise the convention of the king and his nobles, as well as the assembly of the estates or the parliament*.

NOTE

* Du Cange, Gloss. voc. Curia. Spelman, Gloss. voc. Magnum Concilium.

N O T E XXII. Page 118. [Y].

Titles of Honour.

WHEN it was the fashion to disunite territory from honours, *titles* came into use. Hence, the late appearance of mere titles of nobility, in all the kingdoms of Europe. In Scotland, the dignity of Duke was much posterior to those of Earl and Baron. It does not seem to have been known till the times of Robert III. *. And the titles of Marquis and Viscount were not in existence till the days of James VI. †.

Knighthood, as an *honour* in connection with arms and with land, was, I conceive,
of

* Acta Rob. III.

† Selden, Tit. Hon. part. ii. ch. vii.

of high antiquity in Scotland, as well as in other nations ; though it is difficult to find any traces of it before the age of Malcolm III. The oath administered to knights in this kingdom, has been preserved with more care, than the other circumstances which relate to this order ; and it illustrates the spirit and gallantry which took their rise from chivalry *. The knighthood of chivalry, however, is not to be considered as a mere *title* of honour ; and the title of baronet, which was suggested by it, was not introduced till the times of James VI. †.

N O T E

* Appendix, No. III.

† Spelman, Gloss. voc. Baronettus.

NOTE XXIII. Page 118. [Z].

The Knight's Fee, a Parliamentary Qualification.

IT has already been observed, that the knight's fee might be divided into particles. It might even be split into sixty fragments; and of such small fractions, there were tenants *in capite* of the crown *. These vassals were very low in life, and their property was not sufficient to maintain them with common decency. Yet, by a strange mistake, Dr Robertson has admitted them into our parliaments. For, to
this

* Madox, Hist. of the Exchequer, vol. 1. p. 651.

this honour, he advances every tenant *in capite*, without exception *.

I insist not on a whimsey, which is so obvious in itself, that even folly cannot be deceived by it. The historiographer of Scotland did not, I imagine, perceive the full import of the language he employs; and, I willingly place this slip among those unavoidable inadvertencies, from which no literary performance was ever free †. Yet, in an author who is fond of tenets that are slavish and ignoble, it is pleasant to remark a mistake of this sort. A propagator of high principles of monarchy promotes the meanest of all mankind, the refuse and banditti of a nation, into the rank of its legislators. He goes beyond all the admi-

T rers

* Hist. of Scotland, vol i. p 65.

† ————— Quas aut incuria fudit,
Aut humana parum cavit natura.

HORAT.

ers of liberty, and exceeds the maddest rage of republican ardour.

The lowest parliamentary qualification was, I conceive, *a single knight's fee* held from the crown. This idea accords with the spirit of the feudal system; and a single fee must have been a considerable estate. It will not escape the attention of the thinking reader, that the prince had it thus very much in his power to add to the number of this class of men. On the forfeiture of a baronial estate, he might dismember it, and give it away in single fees, to a long train of proprietors. Hence, he might command an immense weight in parliament. And, to this source, doubtless, though it is unnoticed by our historians, we must refer, in a considerable degree, the influence of the sovereign in those antient times, which preceded the representation of the simple vassals *in capite*, or the inferior tenants of the crown.

NOTE

N O T E XXIV. Page 119. [AA].

The Distinction of the Greater and the Lesser Barons.

IT is an interruption to this work, that I find a popular writer perpetually in my way. But, I desire it to be observed, that I content myself with pointing out those errors of his only, which are more materially connected with my subjects ; and this, without taking the trouble, on every occasion, to show my argument in all its strength, or to make it press in the scale of controverfy, with its fullest weight. For, I differ from him, rather with the view of supporting my own opinions, than from any pride of overturning his. And this in-

T 2

timation,

timation, I trust, the spirit of these papers has already conveyed to those of my readers, who have attended to the history of the middle times, and are the most versant in the topics I venture to treat.

‘The vassals of the crown,’ says Dr Robertson, ‘were originally few in number, and extremely powerful; but, as it is impossible to render property fixed and permanent, many of their possessions came gradually, and by various methods of alienation, to be split and parcelled out into different hands. Hence arose the distinction between the *greater* and the *lesser barons*. The former were those who retained their original fiefs undivided; the latter were the new and less potent vassals of the crown.’

From

* History of Scotland, vol. i. p. 65. 66.

From this reasoning, it is to be concluded, that the original vassals of the crown were all *great* barons ; and that the splitting of their possessions or baronies was to produce the *lesser* barons. This distinction, however, was long prior to the splitting of baronies, and could not owe its rise to this circumstance. This is to date the origin of the *lesser* barons some centuries after they had been known in every nation of Europe. It is to ascribe to fiefs, in their decline, what was characteristic of them, from the age of their perpetuity, and the invention of knight-service. It is to annihilate altogether, for long periods of time, an order of men, who had great political influence, and who made a figure in the army and in the state.

Tenants *in capite* were as old as barons, properly so called. Under the general name of tenants *in capite*, or of the crown, there were included, not only the nobility,

T 3 but

but those private gentlemen who had estates from the sovereign. Now, to these two classes of men, the term *baron*, as denoting the royal vassal, was applicable; and, of this, the examples are endless. But the tenant *in capite*, who had been created into *nobility*, was essentially different from the simple tenant *in capite*, who had only knight-fees *. He was the *greater* baron, and the other was the *lesser* baron.

To conceive with this author, that all the vassals of the crown were originally *nobles*, or great barons, is to admit an absurdity. The original possessor of a fief might hold it undivided, without being a *noble* or a *great* baron. He might possess a single knight-fee, twenty knight-fees, a thousand knight-fees, or any number of them whatever, without belonging to the order of the nobility. Before he
could

* Chapter iv. sect. ii.

could be *noble*, it was necessary that his knight-fees should be erected into an *honour* by the prince.

The splitting, however, of baronies, though it was not the effective cause of the creation of the *lesser* barons, was to add greatly to their number. But it ought not to be forgot, that the splitting down of the estate of a simple tenant *in capite*, was likewise to be attended with the same consequences. For, an estate of twenty knight-fees, which had belonged to a vassal of this kind, might be granted away to twenty proprietors, and give a parliamentary qualification to each of them.

I perceive, that the abstaining from the consideration of the condition of the simple tenant *in capite*, has produced the greatest confusion in our antiquities, as well as in those of other nations. The majority of authors delight to survey the regal and

aristocratical parts of the feudal system. They attend neither to the numbers, nor to the importance of the inferior tenants *in capite* ; and they overlook the greatness of the people.

NOTE

N O T E XXV. Page 121, [B B]. .

The Knights or Commissioners of the Shire.

THE statute or ordination, which established ‘ the knight’s or commissioners of the shire,’ was a parliamentary act, and is expressed in the following terms.

‘ The King, with consent of the hail council, generallie has statute and ordained, that the small baronnes and free-tennentes neid not cum to parliaments nor general counceles, swa that of ilk schirefdome their be send, chosen at the head court of the schirefdome, twa or maa wisemen, after the largenes of the schirefdome, outtane the schirefdomes of *Clakmannan* and *Kinrossfe*, of the quhilkis ane be sende of ilk ane of them, the quhilk fall be called *commissares of the schire*, and, be thir commissares of all the schires fall be chosen
‘ ane

'ane wise man and expert, called the com-
'moun speaker of the parliament; the
'quhilk fall propone all and findrie needis
'and causes, pertaining to the commounes
'in the parliament or general council, the
'quhilkis commissares fall have full and
'hail power of all the laif of the schiref-
'dome, under the witneffing of the schri-
'reffis seale, with the seales of diverse bar-
'ronnes of the schire, to heare, treat, and
'finallie to determine all causes to be pro-
'poned in council or parliament: The
'quhilkis commissares and speakers, fall
'have costage of them of ilk schire, that
'awe compeirance in parliament or coun-
'cel, and of their rents, ilk pound fall be
'utheris fallow to the contribution of the
'said costes. All bishoppes, abbottes, pri-
'ors, dukes, erles, lordes of parliament,
'and ban-rentes, the quhilkis the King will
'be received and summoned to council and
'parliament, be his special precept *.'

As

* Statutes, James I. parl. 1427, cap. 102.

As the Scottish parliament was not divided into two houses, 'the common speaker,' here alluded to, did not advance into high consideration. With regard to the *ban-
rentes*, who are enumerated among the parts of the parliament, it may not be improper to observe, that they were tenants *in capite*, who had the right of a *banner*, or the command of a troop. Their feudal estates were so considerable, that their military command extended over vassals who were numerous enough to entitle them to have a standard; and as, in this distinction, they rivalled the nobles, so, like them, they had also the privilege of being called to the parliament*.

A most important distinction between the knights of the shire in England and Scotland is to be remarked. For we must not conceive, with my Lord Kaimes, that, in England, the knights 'were elected precisely

* Spelman, Gloss. voc. Banerettus.

‘cifully as in Scotland *.’ It was only the simple tenants *in capite* who were to be represented in Scotland. But, in England, the whole community of the counties was represented. The freeholders or electors of Scotland were tenants of the crown. But the freeholders of England were the whole possessors of territory or tenement. The representation of the Scottish counties was partial and incomplete; for it excluded from the right of electing, or of being elected, all the proprietors who did not hold of the crown. The representation of England was general, and on the grand line of democratical polity.

The consideration of the causes of this essential diversity in the two nations, would lead to curious investigation; but is too great an object for a note in this work. I cannot, however, omit the opportunity to observe, that the fashion of describing the usages

* *Essays on British antiq.* Ess. ii.

usages and customs of Scotland, as adoptions from England, is in a high degree deceitful and fallacious. The similarity of the institutions of the two kingdoms, is not always so great as it is supposed; and, where it is strongest, it has its foundation in the nature of fiefs. Now, these were common to the other nations of Europe, and produced in all of them a general likeness or similitude. Yet, in all of them, there were circumstances of discrimination; and Scotland was not, any more than the other feudal states, to be governed by a mean spirit of imitation.

Of the law of James I. which I have recited, and which is so memorable in our history, there is a confirmation and an improvement by James VI. They are in these words:

‘ Our soveraigne Lorde, considering the
‘ acte of his Hienesse parliament, halden
‘ at Linlithcow, the tenth day of Decem-
‘ ber, the zeir of God, one thousand
five

‘ five hundredth, fourscore, five ziers ; ma-
‘ king mention, how necessar it is to his
‘ Hieneffe, and his estaites, to bee trewlie
‘ informed of the needes and causes per-
‘ taining to his loving subjects in all estaites,
‘ speciallie the commounes of the realme.
‘ And remembring of ane gude and lovable
‘ acte, made by his Highnesse progenitour,
‘ King James the first, of worthie memo-
‘ rie, in the parliament halden at Perth,
‘ the first day of March, the zeir of God
‘ ane thousand, four hundreth, twenty-se-
‘ ven zeires, anent the commissioners of
‘ small barronnes in parliament ; that his
‘ Majestie, and his saidis estaites, wald ra-
‘ tifie and appreeve the same to have full
‘ effect, and to be put to execution in time
‘ cuming : And of new, statute and or-
‘ daine, for the mair full explanation of the
‘ same act, and certaine execution thereof,
‘ that precepts suld be directed foorth of the
‘ chancellarie, to an barron of ilk shire
‘ first, to conveene the freeholders within
‘ the

' the same schire, for chusing of the com-
' missioneres, as is contained in the same
' acte : Quhilkis commissioners, being anis
' choosen, and send to parliament, the pre-
' cepts of parliament, for conveening of
' freeholders, to the effect foresaid, to be
' directed to the last commissioners of ilk
' schire, quhilkis fall cause choise twa wise
' men, being the *Kingis free-balders*, resi-
' dent indwellers in the schire, of gude
' rent, and weill esteemed, as commission-
' ers of the same schire, to have power,
' and to be authorized, as the acte proportis,
' under the commissioners seale, in place of
' the schireffes ; and that *all free-balders of*
' *the King*, under the degree of prelates and
' lords of parliament, be warned by pro-
' clamation, to be present at the choosing
' of the saidis commissioners ; and nane to
' have voit in their election, bot sik as has
' *fourtie shilling land in free-tennendrie, bal-*
' *den of the King*, and has their actual
' dwelling and residence within the same
' schire.

‘schire.—And that the compeirance of
‘the saidis commissioners of the schires in
‘parliaments or general counsellis, shall re-
‘lieve the *bail remanent small baronnes and*
‘*free-halders of the schires*, of their suites
‘and presence, aucht in the saidis parlia-
‘ments*.’

By this act no person was to vote for the commissioner of the shire, or to be capable himself of being elected to this honour, who did not possess a forty shilling-land holding of the crown. By the act 1681, lands of four hundred pound of valued rent, holden of the crown, are considered as equivalent to a forty-shilling land of old extent. And proprietors under these descriptions continue to elect and to be elected.

On the foundation, however, of these acts, an ingenious contrivance has been practised.

* Stat. James VI. parl. 1587, cap. 113.

practised. In consequence of splitting and dividing estates, *qualifications* are created. Thus, a real freeholder may retain a sufficient qualification for himself; and, if his fortune can bear it, may raise up ten or more qualifications, which he may distribute to his friends, who are to vote by his direction. This immense multiplication of voters does not seem to accord with the spirit of the Scottish constitution. The legislature intended, that the real freeholder, whatever estate he might possess, should only have a voice for himself. It could never mean, that he should be followed by a train of freeholders of his own making.

U

NOTE

NOTE XXVI. Page 125. [CC].

Points of Honour, and Peculiarities of Rank.

IN towns, where men gather together in bodies, there are always the greatest encouragements for virtue and vice. Individuals go to them as to a market, and put up to sale their talents and their demerits. Even in antient times there were, therefore, a multitude of inhabitants in them, who were necessarily of a most mean and low condition. Hence it happened, that particular expressions were invented to do honour to *burgesses*, and to distinguish them from *villeins* and the mob. They were called for example *boni homines* *. Hence the phrase, *the good town*, which is yet in use throughout Scotland. And hence the speech of Brian Tath, the yeoman

* Du Cange, Gloss. voc. Boni Homines.

yeoman of the guard, who, in the days of James I. of England, sent rudely some *commoners* from the house of peers: 'Good *men*, BURGESSES, you come not here *.' The expression for the slaves and the rabble was *homines potestatis, gens de poeste*; and hence 'the knights of the *post*' is yet, in England, the description of those despicable men who give their evidence for hire.

After the rights of the burgesſes were invaded, and when the King and the nobles, in the decline of fiefs, exercised oppreſſion upon the cities and boroughs within their jurisdictions, men of rank and faſhion were to be attached to a country-life in a more particular manner. They had at all times been fond of reſiding at their eſtates, from the grandeur and conſequence they enjoyed in them. But this cuſtom, from the humiliation of the towns, had become more

U 2

flatter-

* Petyt, *Jus parliamentarium*, p. 234.

flattering. And, when their affairs called them to reside, for a few days, in any city or borough, they went constantly in boots and spurs, that they might not be mistaken for citizens. Hence the invidious distinction of the *gentleman* and the *burgher*.

Of the *homines potestatis*, the condition was most miserable and wretched. When they escaped from their masters, it was a law in every nation of Europe, that they might be drawn back by the *nose* to *servitude* *. Hence it came to pass, that, to pull a *free man* by the nose, was to treat him like a *villein* or a *slave*. Such was the origin of a point of honour which still exists. It is now a part of our manners, and has survived the causes which gave it birth.

In

* Et cum aliquis adjudicatur natus, seu bondus uni domino; potest ille dominus, ipsum, per *nasum suum*, redigere ad *pristinam servitutem*. Quon. Attach. cap. 56. l. 7.

In times when the feudal law introduced the most exact distinctions about rank, and when the decorums of chivalry drove them to a most punctilious extremity, a thousand delicacies in civil life were to arise.

To the affirmations of a slave or a mean person, no attention was paid. It did not seem that he could have any faith or probity. But a gentleman, when he advanced his word, or when he pledged his honour, could not be doubted. To suspect his veracity, was to insult him. When a nobleman advanced his word, or pledged his authority, he was still less exposed to suspicion. His affirmation was equivalent to an oath. Hence, to this hour, when a peer is sitting in judgment, he gives his verdict upon his *honour*. A peculiarity which is well known in the English law, gives its strength to this reasoning. For, while the peer enjoys, from his nobility, this beautiful distinction, he loses it when

he is a simple witness in a civil or criminal cause. He must then be upon oath; for he is acting as a plain man, and not in his own character.

It may be added, that, of old, from a similar spirit of usages, the damsels who attended the Queen, were termed 'Maids of honour.'

NOTE

N O T E XXVII. Page 127. [DD].

Facts, Reasonings, and Conjectures to illustrate the History of Towns.

IT is a matter of surprise, that authors, even of eminent talents, in producing what they are pleased to consider as the evidence of the uniform servility of the towns and the people, do not perceive, that, in general, they are busy to refute the conclusion about which they are so anxious.

As a proof of the antient slavery of the towns and the people of England, Dr Brady and Mr Hume appeal to the charter of liberties to the city of London by William the Norman. ‘ The famous charter, as it is called, of the Conqueror to the city of
U 4 ‘ London,’

‘London,’ says the last of these writers, ‘though granted at a time when he assumed the appearance of gentleness and lenity, is nothing but a letter of protection, and a declaration that the citizens should not be treated as slaves*.’ This is not merely a strong method of expressing himself. There is even something supercilious in it, as if the matter could not admit of any dispute. Yet, in fact, this charter only proves, that the feudal customs had grown to be oppressive. It offers, accordingly, a mitigation of usages which were cruel and unjust; and it actually alludes to the *freer* and the *happier* condition which the people had enjoyed in the Saxon times †.

In

* Hist. of England, vol. 1. Append. ii.

† This charter is as follows. ‘Willielmus Rex salutavit Willielmum Episcopum et Godfridum Portegresium, et omnem Burghware infra London, Franc. et angl. amicabiliter:

In the same fashion they appeal to the *Magna Charta* as an evidence, that the liberties of the towns and the people were produced by the grants of the sovereign. Yet the *Magna Charta* was a renovation of former liberties; and, with regard to London, in particular, it ordains, that it shall be admitted to the enjoyment of its *antient* and *free* customs. ‘Et civitas Londonensis habeat omnes *antiquas libertates*, ‘*et liberas consuetudines suas*, tam per terras, ‘quam per aquas *.’ They disregard the real intentions of this deed, and view it in a light that is partial and delusive.

Mr Hume has insisted, that the *tallages* with which the sovereign oppressed the towns,

‘amicabiliter : Et vobis notum facio, quod ego vole, quod
‘vos sitis omni lege illa digni, qua fuistis Edwardi diebus Regis.’

‘Et volo quod omnis puer sit patris sui haeres post diem patris sui. Et ego nolo pati, quod aliquis homo
‘aliquam injuriam vobis inferat. Deus vos salvet.’ *Charta Will. Regis. ap. Spel. Cod. Leg. Vet. p. 290.*

* *Mag. Charta, ap. Spelman, Cod. Leg. Vet. p. 369.*

towns, are an argument of the long and deplorable dejection of the people *. Yet the *tallage* which the prince came to exact at his pleasure, was founded on a *benevolence*, which the inhabitants of them had bestowed upon him at *their* discretion. Before it was a *tax*, it was a *donum* or a present. It had been expressive of freedom and generosity, before it denoted oppression and tyranny †.

He contends, that, till the invention of *communities* by Louis the Gross, the towns did not form any body politic, and were held together by no civil tie ‡. Yet, the erection of communities was expressly to revive their antient importance; and gilds, fraternities, and corporations, were known
in

* Hist. of England, vol. ii, p. 99.

† View of Society in Europe, in its progress from rudeness to refinement, book ii. ch. v. and the notes.

‡ Hist. of England, vol. i. Append. ii.

in the Saxon times, and, indeed, are as old as the settlements of the barbarians *.

But, around the greatest mistakes of this illustrious man, his genius has thrown a dazzling light of uncommon ingenuity; and no candid inquirer will dissent from him, without doing him the justice to admire his talents. It is by reflection, and in the writings of his imitators and followers, that his errors appear with all their disadvantages.

This argument, in particular, about the rise of *communities*, has been insisted upon as very powerful. And it is concerning the charters of community, in the twelfth and thirteenth centuries, that the biographer of Charles V. has this passage. ‘ These
‘ may be considered as the first rudiments
‘ of

* Spelman, Gloss. voc. Gilda. Domes-day-book, as cited by Dr Brady, and other writers.

‘of law and order, and contributed greatly to introduce regular government among all the members of society. As soon as communities were instituted, high sentiments of liberty began to appear*.’

Is it possible, even in the slightest degree, that these charters could be the *first rudiments* of law and order? Was there neither law nor order till these charters were granted? Was every thing in confusion and tumult for so many ages? And, from the irruptions of the barbarians, till this fortunate aera, did the nations of Europe entertain no sentiments of liberty? All this is incredible. These charters, in fact, were to renew a condition of society, which had existed in prior times, and which had been defaced by the breaking down of the feudal system. They were to bear in their bosom

* Hist. of Charles V. vol. i. p. 257.

bosom an allusion to this condition of society. And jurisprudence and law had actually grown into *codes* and *systems*, in many countries of Europe, long before the twelfth and thirteenth centuries.

These codes and systems are known to the learned. They are not peculiar to one or to two tribes of the barbarians, who conquered and made settlements. They are to be found in many of them. They may be traced as they rose in Spain, in Italy, in France, in Germany, and in England *. In innumerable instances, they are even admirable for their wisdom. The learned Giannone delights to mention them, in terms the most respectful †. The penetrating

* LL. Wisigoth, Burgund. Alaman. Baiivar. Ripuar. Saxon. Longobard, &c. See the collections of Lindenbergius, and Georgisch. See also LL. Anglo-Saxon. in the editions of Lambard, or Wilkins.

† Hist. of Naples, book. iii. iv. v. vi. &c.

trating Grotius has extolled them as preferable, on many accounts, to the civil laws, or to the jurisprudence of the Romans *. The immortal Montesquieu has, on some occasions, done them the honour to speak their eulogium †.

But, while it is to wander very widely into the regions of romance, to ascribe the first rudiments of *law* and *order* to the charters of community, in the twelfth and thirteenth centuries, it is equally so to impute to them, with this writer, the introduction of *high sentiments of liberty*. The barbarians were animated with high sentiments of liberty in their forests. They carried them into their conquests; and every where, in the early periods of their history and legislation, the marks of them are to

* Prolegomena, ad Hist. Goth.

† L'Esprit des Loix, liv. 28.

to be observed in characters that are strong and indelible.

Till the decline and confusions of the feudal system, the condition of Europe, in all its kingdoms, was free and limited. It was in consequence of the change of the Gothic and the Celtic manners, that the people were to pass from a state of liberty, to a state of oppression, and that the original spirit of the feudal association was to undergo a total alteration *.

Now, the first condition of the towns and the people, as I remark in the text, must have been a scene of freedom or of happiness. And, in this condition, corporations and boroughs were actually known, and of importance †. The second aera of their

* View of Society in Europe, in its progress from rudeness to refinement, book ii.

† Domes-day book, in the quotations of Dr Brady, and other writers.

their history was deformed with miseries; And it was from this wretchedness, to the felicities of their former independence, that the charters of community were to contribute to restore them.

Thus the conclusions of the biographer of Charles V. are to be considered as fallacious, under every aspect in which they can be viewed. But, as this subject of the towns is highly curious and interesting, I proceed to throw out some additional observations concerning it.

After towns became oppressed, it would be natural for them to look back, with anxiety and regret, to the liberties which had been wrested from them. And, a consequence of this anxiety and regret, would be an attempt to recover them. These things were really to happen. Towns in subjection to the sovereign and to the nobles, were to give *fines* or payments, to receive

ceive anew, in part or in whole, the privileges they had lost. In the records, accordingly, of all the feudal states, the purchase of privileges formerly enjoyed, and claims of antient rights and liberties, were frequent; and they will be allowed to be effectual proofs of the condition of the towns and the people, both in their states of happiness and calamity.

The men of Coventry gave xx marks to Henry II. to have his confirmation of their liberties. For their liberties x marks were given to Richard I. by the burgeses of Carlisle; and cc marks, on the same account, were presented at his exchequer by the burgeses of York. Of these, and a variety of other fines by towns, for the recovery and security of their liberties, there are evidences in the records, which are published by Mr Madox *.

X

A

* Hist. of the Exchequer, vol. i. ch. xi.

A claim of liberties, which had belonged to his ancestors in times beyond all memory, was made by Gilbert de Gaunt, in the seventh year of Edward I. *. In the days of Richard II. the Earl of Richmond complained, that the officers of the crown had invaded his county, and exercised exactions and tyranny, upon his men and his tenants. He enumerated these exactions, and described this tyranny. He asserted and claimed their *antient* liberties; and, his pleas being sustained, a charter was issued from the crown in acknowledgment of their freedom, and exempting them from all oppressions †.

What those *liberties* were, which the towns,

* Clamat liberam chaceam, et liberam warrennam, et infangtheof. in omnibus dominicis terris suis in Swaldale, emend. Assise panis et cervisie fract. et fur. as in Rithe et Swaldale *ab antiquo*. Et dicit, quod ipse et omnes antecessores sui, a *tempore quo non extat memoria*, semper usi sunt hujusmodi libertatibus, absque aliqua temporis interruptione. Et in hoc ponit se super patriam. *Clameur Gilberti de Gaunt, ap. Registr. Honoris de Richmond, p. 91.*

† Appendix, No. IV.

towns, as corporations, or bodies politic, had possessed in old times, it is difficult to say with entire precision. In general, however, the names of them are to be found *.

And, with regard to the *oppressions* which the sovereign and the nobles exercised upon the towns and the people, within their respective and peculiar jurisdictions, they are also to be enumerated †. Now, the charters of community to towns, were expressly to revive those *liberties*, and to take away these *oppressions* ‡. The towns and

X 2

the

* They seem, in a great measure, to be contained in what is meant by ‘foca, facca, tol, theam, infangthes, et utfangthes.’ See LL. Anglo-Saxon. ap. Wilkins, p. 202. and the Glossaries.

† These, in general, are expressed by the terms theolonium, lestagium, passagium, paagium, pontagium, stallagium, leva, et tallagium.’ See the Glossaries.

‡ A charter of franchise or community by King John, speaks in this manner. ‘Sciatis nos concessisse et praesenti carta nostra confirmasse burgenibus nostris de Gernemua, quod habeant burgum de Gernemua ad feodi firmam in perpetuum, et quod burgus ille sit liber burgus

the people, therefore, had been first free; they were then oppressed; and they were next to return to freedom again.

In revolving the force of these particulars by themselves, and in their union, it is impossible not to perceive, that the towns and boroughs, in their earliest condition, were not only free and happy, but even consequential and considerable. To what aera, then, but to this, are we to look for the rise of the parliamentary towns and boroughs? They could not possibly obtain this privilege in the second condition of their history; for then they were miserable and under oppression. And, if they had not

‘burgus in perpetuum, et habeant focam et facam, tol et
 ‘theam, et infangthes, et utfangthes, et quod ipsi burgenfes,
 ‘per totam terram nostram, et per omnes portus maris,
 ‘sint quieti de theoloneo, lestagio, passagio, paagio, pontagio,
 ‘stallagio, et de leve et de danegeld, et omni alia consuetudine.’
Dr Brady, Treatise of English boroughs, Appendix, p. 8.

not obtained it, till after the grant of charters of community, in the twelfth and thirteenth centuries, the great and the little circumstances, which must have attended a transaction so memorable, could not possibly have been swept away so completely, as that no memorial whatever should be left, to decide irrefragably their existence.

It accords, too, with this way of thinking, that parliamentary boroughs might lose their privilege of representation by disuse, and from poverty. For they were to decline, when the towns were in their state of oppression. It accords with it, also, that they should rise up from oppression, and that they should lay claim to the right and the honour which they had exercised and sustained of old. And, in reality, do we not learn from records and history, that Barnstable, after having been a parliamentary borough, in the Anglo-Saxon times, neglected to

send its burgesſes to parliament, till the days of Edward III. when it claimed its antient privilege, and was inveſted in it *? And do we not know, that Agmondeſham, Wendover, and Great Marlow, after an interruption of four hundred years, made a claim of their antient parliamentary rights, and were found by the commons and the king to be parliamentary boroughs from *preſcription* †?

To theſe remarks I might add, the poſitive and concluſive evidence which ſupports the high *antiquity of parliamentary* BOROUGHs in England. But, I hold the matter of this note to be ſufficient to juſtify what I have ſaid in my text. And it ſuits not the views with which I now write,
and

* Hody, Hiſt. of councils and parliaments, p. 375.
376.

† Brown Willis, ap. Lyttelton's Hiſt. of Henry II. vol. iii. p. 389.

and the narrow limits within which I must confine myself, to enter upon a subject so vast in itself, and so infinitely perplexed by the passions and ability of the advocates for the crown, and for the people.

NOTE

NOTE XXVIII. Page 128. [EE].

The Antiquity of the Representation of the People. The Principle of this Representation.

THE antient and modern historians of Scotland, neglect very much all constitutional matters. The state-papers, and the public archives of this nation, have never been collected. The antient laws, which have been preserved and published, are not only few and inconsiderable, but have not been presented to the studious, in any perfect form. These disadvantages have apologized for what I have hitherto done ; and they are to plead for what I am yet to do.

In

In the consideration and importance of the *people* of old, I find an inducement of the strongest kind to believe their *representation*; and I despair not to produce, from legal and historical monuments, a sufficient evidence of the propriety of this opinion.

A charter, of a religious endowment at Dunfermline, by Malcolm III. makes an express mention of the *parliamentary* powers of the *people* *. But what, it is to be asked, was the rank of the people in this age? Before the days of James I. the inferior tenants of the crown were the *lesser* barons, and they appeared personally in our parliaments. Before the invention, therefore, of the *knights of the shire*, when the *people* are recorded as a part of the parliament, the allusion must be made to the *burgesses*. It is, accordingly, to the *parliamentary* powers of the *burgesses*, that this charter has appealed;

* Appendix, No. V.

ed ; and, in fact, before it speaks of the *people*, it had enumerated the *higher* orders of the legislature.

The preamble to the acts of William the Lion, who began to reign in the year 1165, is in these words.

‘ Statuta, five assise regis Wilhelmi, regis
‘ Scotie, factae apud Perth, coram episcopis,
‘ abbatibus, baronibus, et aliis *probis homi-*
‘ *nibus* terrae suae.’

In the body of his laws there are these notices.

‘ Assisa regis Wilhelmi, facta apud Perth,
‘ quam episcopi, abbates, comites, barones,
‘ thani, et *tota communitas regni*, tenere fir-
‘ miter juraverunt *.’

‘ Item,

* Cap. 7.

‘ Item, rex Wilhelmus statuit apud Sco-
‘ nam, per *commune concilium regni sui* *.’

In the statutes of Alexander II. the pas-
sages which follow deserve to be considered.

‘ Statuit dominus rex Alexander, illu-
‘ stris rex Scotiae, de concilio, et assensu
‘ venerabilium patrum, episcoporum, abba-
‘ tum, comitum, baronum, ac *proborum ho-*
‘ *minum suorum Scotiae* †.’

‘ Statuit rex per consilium et assensum
‘ *totius communitatis suae* ‡.’

The preamble to the laws of Robert I.
is in these words.

‘ In Dei nomine, Amen. Robertus Dei
‘ gratia, Rex Scotorum, anno regni sui de-
‘ cimo tertio, die dominica proxima, cum
‘ con-

* Cap. 9.

† Cap. 2.

‡ Cap. 4.

‘ continuatione dierum, post festum Sanc-
 ‘ ti Andreae Apostoli, subsequendum : Re-
 ‘ fidens apud Sconam in plano parlamento
 ‘ suo tento ibidem ; habitoque solemniter trac-
 ‘ tatu, cum episcopis, abbatibus, prioribus,
 ‘ comitibus, baronibus, et aliis magnati-
 ‘ bus, de *communitate totius regni* ibidem
 ‘ congregatis, super variis et arduis nego-
 ‘ tiis, ipsum et regnum suum tangentibus,
 ‘ atque in futuro tangere valentibus : Ad
 ‘ honorem Dei, et sanctae matris ecclesiae,
 ‘ et ad emendationem terrae suae, tuitionem
 ‘ populi, et ad pacem terrae suae manute-
 ‘ nendam, et affirmandam. De *communi*
 ‘ *concilio*, et expresse consensu, omnium
 ‘ praelatorum, et libere tenentium praedic-
 ‘ torum ac *totius communitatis* praedictae ;
 ‘ ordinavit condidit, et stabilivit statuta in-
 ‘ fra scripta ; ab omnibus per totum reg-
 ‘ num suum perpetuo, et inviolabiliter ob-
 ‘ servanda *.’

When

* Prim, Stat, Rob. Primi.

When the prelates, the nobles, and the tenants *in capite*, or the lesser barons, are expressed as parts of the legislative body, the meaning of the terms employed are obvious. But what were the *probi homines* in the laws of William and Alexander? They must point to another branch of the legislature. Thus, when John Balliol told Edward I. that he *could not*, and *dared not* express any sentiment which concerned his kingdom, ‘without consulting his *people*,’ *inconsultis probis hominibus regni sui**, he meant something more than the sanction of the prelates, the nobles, and the tenants *in capite*. The extensiveness of his expression is cramped and confined when applied only to these. He must have alluded to the *representatives* of the *people*, and to their parliamentary power, as well as to the legislative authority of the prelates, the nobles, and the tenants *in capite*. Now, ‘these re-
‘ pre-

* Ryley, Placit. Parl. p. 159. an. 1293.

‘presentatives of the people’ must have been *the burgessees*; for there were yet no ‘knights of the shire.’ And thus the expression of Balliol, in its extensiveness, is easily comprehended, and had a reference to the *whole kingdom*.

The terms *commune concilium*, in the laws of William and Robert, expressing the *nationality* of parliaments, confirm this conclusion, and receive a confirmation from it in their turn.

The same thing is to be said of the words *tota communitas* in the laws of William, Alexander, and Robert. And as to the expression *magnates* in those of the last, in an allusion to the representation of the *people*, it was, by no means, misapplied. For, in England, it appears exactly in the same sense; and we know, both from Rymer and Petyt, that, in that kingdom, *noble, most noble, most illustrious, most gracious seigniors,*

nors, monseigniors, and fires, were appellations of the commons *.

But, to give a weight to these particulars, and a decision to this subject, I appeal to an actual and complete evidence, not only of the *representation* of the *people*, but of a *grant of money* by them in the reign of William the Lion.

‘ Hoc anno † Rēx Scotiae Willelmus
‘ *magnum* tenuit *concilium* apud Strivelyn,
‘ ubi interfuit frater ejus comes David de
‘ Huntynghdon, paulo post festum Sancti
‘ Michaëlis ; ubi, petito ab optimatibus au-
‘ xilio, pro pecunia regi Angliae solvenda,
‘ promiserunt se daturos decem mille mar-
‘ cas, praeter *burgenses regni*, qui *sex millia*
‘ mar-

* Antiq. power and decay of parliaments, p. 17. The
antient rights of the commons of England asserted, p.
94. 95.

† 1211.

‘*marcarum promiserunt, praeter ecclesias,*
‘*super quas nihil imponere praesumpse-*
‘*runt **.’

Here there is mention of the three estates of the realm, the nobles †, the *burgesses*, and the clergy.

Abercromby, who is remarkable for mean prejudices, and the want of penetration, has affirmed, that Robert I. introduced the *burgesses* into our parliaments ; and that this is evident from an Indenture
‘drawn up between him and the earls, ba-
‘rons, freeholders, and communities of
‘*burghs*, anno 1326, in a parliament hol-
‘den at Cambuskenneth, by which, upon
‘considerations therein narrated, the King
‘ob-

* Fordun, Scotichronicon, lib. viii. cap. 83.

† Under the general name of Nobles, old writers often include the greater and the lesser barons, or the whole body of the temporal tenants *in capite*, who had a title to appear in parliament.

‘obtained a grant, during his life, of the
‘tenth penny of all the farms and re-
‘venues belonging to the laity of the
‘kingdom, both within and without the
‘burghs *.’

With Abercromby, Dr Robertson has concurred in express terms; and it appears, that they must have considered this indenture as a rule or evidence the most powerful †. Yet, what is particularly unfortunate, this indenture does not say that the *burghesses* were now, for the first time, introduced into our parliaments. It does not mention them as a new or a recent institution. We cannot gather from it that any alteration was then made or intended. It enumerates the *burghesses*, not as a novelty, but as an established branch of the legislature ‡. To this indenture, therefore, I

Y

may

* *Atchievements of the Scots nation*, vol. i. p. 635.

† *Hist. of Scotland*, vol. i. p. 66.

‡ *Appendix*, No. VI.

may be permitted to appeal in my turn; and I consider it as contributing to the general strength of my argument, by illustrating the *antiquity* of the representation of the *boroughs*.

Prior, for a short period, to the year 1326, the fanciful æra from which monarchical writers date the representation of the towns, there was a league between Scotland and France, still to be seen in a roll of the Tower, in which the *towns* and *boroughs* appear as a branch of the parliament, under the description of ‘*universitates et communitates civitatum et villarum regni Scotiae* *.’ Now, it will hardly be contended that these terms are expressive either of the prelates, the barons, or the simple tenants *in capite*, whom the monarchical writers

* Petyt, The antient rights of the commons, p. 33. See farther, Prynne, Ecclesiast. jurisdiction, tom. iii. p. 539-540.

writers hold out at this time as the only parts of the legislature.

In the year 1320, it is likewise to be observed, that the celebrated letter from the Parliament of Scotland to the Pope, complaining of the King of England, enumerates, as its constituent branches, the 'comites, barones, libere tenentes, et *tota communitas* Scotiae *.' And here the *boroughs* are most peculiarly pointed out by the *tota communitas*, as the earls, the great barons, and the freeholders, or the lesser barons, are positively referred to.

Thus, too, in place of the expression *tota communitas*, the term *burgenses* is actually employed in the laws of Robert II. For, when the three estates swear in his reign to support the laws, and the Earl of Carrick as governour of the realm, it is

Y 2

said,

* Anderfon, Diplomat. Scot. tab. 52.

said, ‘ Omnes et singuli praelati, praelatorum procuratores, et alii de clero, comites, barones, et *burgenses* qui interfuerunt ad servanda omnia, et singula praedicta, quantum in eis fuerit, et ad manutenendum, fortificandum, et suffulciendum domum de Carrik sub rege, ad legis regimen, et completionem iustitiae constitutum, iuramenta sua, tactis sacrosanctis evangeliiis, personaliter praestiterunt *.’

But farther, from the words *communitates burgorum*, in the parliamentary recital of the indenture of Robert I. †, from the words *tres communitates* in the laws of David II. ‡, and from the words ‘ ex deliberato consilio, et cum consensu et assensu praelatorum, comitum, et baronum, ceterorumque procerum et nobilium, ac omnium aliorum de *tribus statibus*, sive *communitatibus* totius regni,’ in a statute of Robert

* LL. Rob. II. cap. 17.

† See Appendix No. VI.

‡ LL. Dav. II. cap. 41.

bert II. *, a general and striking argument, in confirmation of what I have remarked, is to be deduced. For, in these passages, which refer to times when it is universally allowed that the *burgesses* were represented, the word *communitas* is applied to the *boroughs* as one of the *three estates*. We may therefore reason back from this evidence to antient times, and conclude, that in these the term *communitas* was also expressive of the same meaning; and this the more especially, when the explanation contended for has so many concurring circumstances to justify, to support, and to establish its exactness and propriety.

The *representation* of the boroughs being thus to be found in the oldest statutes of our princes, and in authentic monuments of history, and appearing in them as an established institution, it is to be said,

Y 3

that

* Appendix, No. VII.

that it loses itself in the darkness of a remote antiquity.

But, though the antiquity of the representation of the boroughs does not, I think, admit of any doubt ; yet the *rule* or *principle* of this right is concealed in time and in obscurity.

We know, indeed, with certainty, that the holding *in capite* was the rule in the reign of Robert III. and that, to this day, it is the *royal* boroughs alone which elect representatives. The preamble to the laws of Robert III. is in these words : ‘ Parliamentum Domini
‘ nostri Roberti Tertii, Scotorum regis illustri-
‘ lustrissimi, tentum apud Sconam die Lunae,
‘ vicesimo primo Februarii ; anno gratiae
‘ millesimo quādringentesimo, regni sui
‘ undecimo, cum continuatione dierum
‘ subsequēntium ; summonitis et ibidem
‘ vocatis, more solito, episcopis, prioribus,
‘ ducibus, comitibus, baronibus, libere tenentibus,

* nentibus, et BURGENSIBUS, qui de domi-
* no nostro rege tenent IN CAPITE *.

This authority, so decisive for the æra to which it refers, and so well illustrated by our subsequent history, is not yet a demonstration, that the holding *in capite* was the principle of the representation of the boroughs, from the *earliest* times. And, I cannot but think, that some principle, more general and extensive in its operation, had preceded this distinction. But a thick cloud covers this subject from observation.

I may, notwithstanding, be allowed to remark, that I can see nothing absurd in the supposition, that many boroughs held under the *nobles*, might be of importance enough to entitle them to send representatives to parliament in very antient times. The democratical genius of the early æras of our history, gives encouragement to this
Y 4 idea.

* Act. Rob. III. ap. Skene, p. 62.

idea. It is supported by the customs of England, where boroughs were represented, which held not *in capite*. And it receives a weight from the consideration of those principles of freedom and enlargement which acted, of old, in the production of the political condition of the county of Sutherland ; a condition which appears now to be so singular,

NOTE

N O T E XXIX. Page 131. [FF].

*The Lords of the Articles. The Freedom of
the Scottish Constitution.*

‘ **A**S far back,’ says the historiographer of Scotland, ‘ as our records enable us to trace the constitution of our parliaments, we find a committee, distinguished by the name of *Lords of Articles* *.’

The most antient aera of the appearance of this council or committee, has been conceived to be the reign of David II. And, if the old statutes of our Kings, which remain, are allowed to be records, and this
will

* Dr Robertson, Hist. of Scotland, vol. i. p. 68.

will hardly be doubted, we can trace the constitution of our parliaments to a remoter age *. It is also to be conceived, that this *committee* was not distinguished by the name of 'Lords of Articles,' till the reign of James IV. †.

'It is extremely probable,' continues this author, 'that the King once had the sole right of nominating the Lords of Articles. It appears, from authentic records, that a parliament was appointed to be held March 12. 1566, and that the Lords of Articles were chosen, and met on the 7th, five days before the assembling of parliament. If they could be regularly elected so long before the meeting of parliament, it is natural to conclude, that the prince alone possessed the right of electing them. There are two different
' accounts

* See Note 28.

† See the Statute-book.

‘ accounts of the manner of their election
‘ at that time, one by Mary herself, in a
‘ letter to the Archbishop of Glasgow.
‘ *We, accompanied with our nobility for the*
‘ *time, pass to the talbuith of Edinburgh,*
‘ *for holding of our parliament, on the*
‘ *7th day of this instant, and elected the*
‘ *Lords Articulars.* If we explain these
‘ words, according to strict grammar, we
‘ must conclude, that the Queen herself
‘ elected them. It is, however, more pro-
‘ bable, that Mary meant to say, that the
‘ nobles then present with her, viz. her pri-
‘ vy counsellors and others, elected the
‘ Lords of Articles. The other account is
‘ Lord Ruthven’s, who expressly affirms
‘ that the Queen herself elected them.
‘ Whether we embrace the one, or the o-
‘ ther of these opinions, is of no conse-
‘ quence. If the privy counsellors and
‘ nobles attending the court, had a right to
‘ elect the Lords of Articles, it was equal-
‘ ly advantageous to the crown, as if the
‘ prince

* prince had had the sole nomination of
* them *.

The nomination of this committee appears from the acts of James I. The preface to his laws is in these words. ‘ *Acta parlamenti Jacobi primi regis Scotorum, tenti apud Perth xxvi die mensis Maii, anno Domini millesimo quadringentesimo vigesimo quarto, et regni sui xix. Convocatis tribus regni statibus, ibidem congregatis electae fuerunt certae personae ad articulos datos per dominum regem determinandos, data caeteris licentia recedendi †.*’

Instead, then, of having been elected by the King, or by his dependants, the Lords of the Articles were chosen in parliament. They were a committee of the three estates,
not

* Hist. of Scotland, vol. i. p. 69. 70.

† Black, Acts, p. 1.

not the creatures of the prerogative ; and they received articles from the King, which they were to examine and to prepare for the parliament. A consciousness of the evidence of this preamble to the acts of James I. has occasioned its omission in the later editions of the Scots statutes ; and, I am presently to point out other omissions, which cannot be censured as too mean or dishonourable ; it being their intention to destroy the parliamentary expressions of the importance of the people.

The testimony of this preamble is confirmed by a statute of James III. in which power is entrusted ‘ be the hail *thre estates* ‘ to *certane personis* underwritten, to com- ‘ moun and conclude upone the maters ef- ‘ ter followand *.’ For the council of the
articles

* Black, Acts, fol. 50. This passage is also omitted in the common editions of the Statutes, in edit. 1681, and 1682.

articles are thus described as a committee of parliament.

With regard to the two opinions explained by Dr Robertson, as expressive of the tenet, that the Lords of the Articles were elected or managed by the crown, their foundations are so vague and equivocal, that they illustrate his wish, without confirming his conclusion. And, indeed, if they had been express and definitive, they could only be evidences with respect to the times to which they point; and no general inference could be drawn from them.

‘The Lords of the Articles,’ it is farther urged, by the historiographer of Scotland, ‘not only directed the whole proceedings of parliament, but possessed a negative before debate *.’

From

* Hist. of Scotland, vol. i. p. 69.

From the constitution of the council of articles, as illustrated by the acts of James I. and James III. it is yet obvious, that it was merely their intention to prepare business for parliament. The subjects into which they were to inquire, were submitted to them; and the result of their deliberations was reported in full parliament, and examined and voted there. But, other testimonies, to evince these particulars, are to be produced.

In the acts of parliament of the reign of James IV. there are these passages.

‘ As touching the renewing and confir-
‘ mation to be maid, of the consideration
‘ and alliance of France, and in likewyse
‘ of Denmark and Hispanzie, it is thocht
‘ expedient, be the *Lordis of the Arti-*
‘ *cles*, that they desyre to purches and ob-
‘ tene sic freindschippis, liberteis, and fre-
‘ domes, for the *gude publique of this realme*;
and

‘ and proffeit of the cours of merchandice,
‘ and sic thingis as fal be sene profitabill be
‘ the Lordis of the Kingis secreit coun-
‘ fall: *That thairfoir the BODY of the*
‘ *PARLIAMENT hes committed POWER to*
‘ the chancellar and secreit counfall, to mak
‘ the instructiouns, and avise sic desyris, as
‘ thay fall think expedient for the gude of
‘ *the King, his realme, and liegis*, quhilkis
‘ fal be done to the King, and in the name
‘ of the *hailbody of his parliament*.

‘ Item, because the *Lordis of the Articlis*
‘ understandis, that it is rycht, expedient,
‘ and neidful, that an ambaxat be send to
‘ the King of Denmark for the renewing
‘ of the allyance, and confirmatioun of the
‘ confederatioun betuix oure Souerane Lord,
‘ his realme, and liegis, and the said King
‘ of Denmark, his realme, and subjectis of
‘ the famin; and to remove all stranenes,
‘ and displefoure confavit be ony prince for
‘ ony cause bypast, and for the personage;
‘ it

‘tioun, cassatioun, and annullatioun, be
‘maid of all giftis, donationnes, infest-
‘ments, few-fermes, feis, lyferentis gevin
‘be his hieness to quhatsumever persoun,
‘sen the day of his coronatioun *.’

These proofs explain fully the use of the Lords of the Articles in our constitution. They were not instruments of tyranny, but a council for facilitating affairs. Articles were submitted to their scrutiny; and they judged not finally, but proposed their overtures to parliament. The parliament was to approve these, or to reject them; and the object of the Lords of the Articles, while they deliberated together, was the emolument of the kingdom, and not the power of the Prince.

From the election of the Lords of the Articles out of the three estates, they were to know

* Black Acts, fol. 84. 85.

The first and second of these paragraphs are omitted in the editions of the statutes to which I formerly referred.

know that opposition and those attentions of interest, which were to tend to the general advantage. The estates continued in this representation, to be a check to one another. And the transactions of this committee being reviewed in parliament, the freedom of the constitution was guarded and secured, in a manner the most effectual.

The historiographer of Scotland proceeds to express himself in this manner, on the subject of the Lords of the Articles.

‘ They came afterwards to be elected
‘ by the parliament, and consisted of an equal
‘ number out of each estate, and most
‘ commonly of eight temporal, and eight
‘ spiritual lords, of eight representatives of
‘ burroughs, and of the eight great officers
‘ of the crown. Of this body, the eight
‘ ecclesiastics, together with the officers of
‘ the crown, were entirely at the King’s de-
‘ votion,

‘votion, and it was scarce possible, that
‘the choice could fall on such temporal
‘lords and burgesſes, as would unite in op-
‘position to his meaſures. Capable, ei-
‘ther of influencing their election, or of
‘gaining them when elected, the King
‘commonly found the Lords of the Ar-
‘ticles no leſs obſequious to his will, than
‘his own privy-council, and, by means
‘of his authority with them, he could
‘put a negative upon his parliament be-
‘fore debate, as well as after it; and, what
‘may ſeem altogether incredible, the moſt
‘limited prince in Europe actually poſſeſſ-
‘ed, in one inſtance, a prerogative, which
‘the moſt abſolute could never attain *.’

From what I have urged, it is clear, that,
of old, the eſtates of the kingdom, not the
ſovereign, elected the council of the arti-
cles. And, it is worthy of obſervation, that,
if

* Hiſt. of Scotland, vol. i. p. 70.

if this privilege had been ever in the sovereign, he would not have parted with it, to bestow it on the parliament. Compliances of this kind are very uncommon ; and, when no evidence of any force is to be found, to support a supposition so whimsical, it must be imputed to an extreme want of political discernment, or the violent attachment to a hypothesis.

It is to be conceived, that the representation of the estates, in the committee of articles, was generally *equal*, from the earliest times of its history. There seem, indeed, to have been variations in the number of the representatives as a *body*. But it was the rule, that an equal number of representatives should be chosen from *each* estate. It is even ordained, by a statute of James VI. ‘ that the number of the Lordes of
‘ Artickles be equal in *ilk* estaite ; and that
‘ the fewest number of everie estaite be sex,

‘and the maist number ten*.’ This method of procedure was evidently calculated for the public good, and the purposes of freedom.

The superaddition of the ‘officers of the ‘crown,’ or rather of the ‘officers of the ‘state,’ to the Lords of the Articles, was a late invention, and an attack upon their independence. It is obvious, therefore, even from this circumstance, that the Lords of the Articles had not always been so submissive as Dr Robertson has supposed.

As to my Lords the bishops, I will not be so bold as to speak their apology. They were, doubtless, the most rotten part of our constitution. But, whatever dependence and venality may be imputed to them, it is, by no means, equitable to infer in the Lords of the Articles a general and uniform corruption.

IN

* Parl. 1587. cap. 37.

In the institution, and in the election of the Lords of the Articles, there appear the marks of legality, and candour, and justice. No arts, which had been used to overawe or direct them in antient times, have been traced or discovered. And, indeed, to gain or to corrupt this council, while it was difficult in itself, was to acquire nothing. For, its overtures being debatable in parliament, the deliberations and authority of the three estates were to overturn all improprieties in their behaviour and conduct.

It was not till a late period in our history, that any attempts were even made, to counteract their virtue and integrity. These might first be thought of in Mary's reign; but, I conceive, they were chiefly fostered by a weak or an artful statute* of James VI. If we believe this statute itself, it

Z 4

was

* * Our Sovereign Lorde, and his estates in this present
* sent

was intended to prevent in parliament the spirit of frivolous disputation. It may, notwithstanding-

‘ sent parliament, having considered the great fascherie
 ‘ and inconvenience of sundrie parlamentes, throw present-
 ‘ ing of a confused multitude of doubtful and informal
 ‘ articles and supplicationes: For remeid theirow in time
 ‘ cuming, statutis and ordainis, that, quhenver the par-
 ‘ liament is appoynted and ordained to be proclaimed,
 ‘ there fall ane convention be appoynted, of foure of eve-
 ‘ ry estaite, to meete twentie dayes before the parliament,
 ‘ to receive all maner of articles and supplicationes con-
 ‘ cerning general lawes, or tuitching particular parties:
 ‘ Quhilke articles and supplicationes, fall be delivered to
 ‘ the clerke of register, and be him presented to the per-
 ‘ sones of the estaites, to be considered be them; to the
 ‘ effect that thinges reasonable and necessary, may be
 ‘ formallie maid and presented in an buik to the Lordes
 ‘ of the Articles, in the parliament time; and all imper-
 ‘ tinent, frivolous, and improper maters be rejected; and,
 ‘ that na artickle or supplication, wantand a special title,
 ‘ or unsubscribed be the presenter, fall be red or answer-
 ‘ ed in that convention or parliament following the
 ‘ same: It is alwayes provided, that his Majestie may
 ‘ present sik artickles as he thinkis gude, concerning him-
 ‘ self, or the common weill of the realme, at all times
 ‘ when he thinkis expedient.’ *Stat. James VI. cap.*
 218.

Even

notwithstanding, have covered a more dangerous purpose. With whatever design, however, it might be framed, this is certain, that it contributed to suggest that negative before debate, of which the monarchical writers are so full, and which was to distinguish the dominations of Charles I. and Charles II. High notions of prerogative, indeed, had been founded in the reign of James VI.; but they received a memorable correction; and the power and freedom of parliaments were proclaimed in language the most respectful and decisive *.

Thus,

Even from this law, it is to be remarked, that the Lords of the Articles had not that consequence which so many writers confer upon them. They were in use to receive articles indiscriminately from all members of parliament; and those presented by the crown are to be viewed in the light of speeches from the throne.

* ' The King's Majestie, considering the honour
' and the authoritie of his supreme court of parlia-
' ment, continued past *all memory of man*, unto thir
' days, as constitute upon the *free votes* of the three e-
' states

Thus, the corruption of the Lords of the Articles was late in making its appearance, and it did not continue long. It was to characterise those reigns which immediately

‘ staies of this auncient kingdome. Be quhom the same,
 ‘ under God, hes ever bene uphalden, rebellious and trai-
 ‘ terous subiectes punished, the gude and faithfull prefer-
 ‘ ved and meinteined, and the lawes and actes of parlia-
 ‘ ment (be quhilkis all men are governed) maid and
 ‘ establisshed. And finding the power, dignitie, and au-
 ‘ thoritie of the said court of parliament, of lait zeires
 ‘ called in sum doubt, at least sum curiouslie travelling,
 ‘ to have introduced sum innovation theiranent, his Ma-
 ‘ jesties firme will and mind alwaies being as it is zit:
 ‘ That the honour, authoritie, and dignitie of his saidis
 ‘ three estaites, fall stand and continew in the awin inte-
 ‘ gritie, according to the auncient and lovabill custome
 ‘ bygane, without ony alteration or diminution. There-
 ‘ foir, it is statute and ordained, be our said Sovereaine
 ‘ Lord, and his saidis three estaites, in this present par-
 ‘ liament, that nane of his lieges and subiectes presume,
 ‘ or tak upon hand, to impugne the dignitie, and the
 ‘ authoritie of the saidis three estaites, or to seek or pro-
 ‘ cure the innovation, or diminution of power, and au-
 ‘ thoritie of the said three estaites, or ony of them in
 ‘ time cumming, under the paine of treason.’ *Stat.*
James VI. cap. 130.

diately preceded the extinction of this council. And, what confirms all I have said, when the convention of estates at the Revolution, was to complain of the Lords of the Articles as a grievance, it was indirectly to acknowledge the propriety of the council itself, and to urge only the invasion which had been made upon the freedom of its election *.

But,

* ‘The estates of the kingdom of Scotland, do represent, that the committee of parliament, called the Articles, is a great grievance to the nation, and that there ought to be no committee of parliament, but such as are *freely* chosen by the *estates*, to prepare motions and overtures that are first made in the house.’ *Acts of the estates, an. 1689, cap. 17.* In conformity to this sense, King William abolished this council. ‘The King and Queen’s Majesties, with advice and consent of the estates of the parliament, do hereby discharge and abrogate, in all time coming, the foresaid committee of parliament, called the Articles; and further cavs, annul, and rescind, 1st Act, 3^d Session, parl. 1st, ch. ii. annent the way and manner of election of the Lords of the Articles, with all other acts, laws, and constitutions establishing the said committee, or Lords of Articles.’ *Acts of William and Mary, an. 1690, cap. 3.*

But, while these remarks are more than sufficient for the end to which they are applied, it will not escape the attention of the reader, that the mixed form of polity which established itself in Scotland, as well as in the other nations of Europe, opposes an irrefragable argument against the prerogative for which the historiographer of Scotland has contended. There are against it positive and definitive evidences; and there are against it the whole rules and fabric of our government*.

The

* Amidst the many marks of freedom which distinguish the Scottish constitution, it is curious to observe, that our Kings of old were to apply, by way of *petition*, to their subjects. In the acts of James I. there is this passage. ‘ Dominus rex obtinuit per modum *requestus* a praelatis et baronibus, quod non removebunt pro anno futuro colonos nec husbandos a terris suis nondum aliis assedatis, nisi domini illarum terrarum illas terras capiant ad usus suos proprios.’ *Black Acts*, fol. 19. ‘ It is thoct speidful,’ says an act of James II. formerly noticed †, ‘ that

† Page 167.

The general descriptions, therefore, and the strong conclusions of Dr Robertson, are not to be admitted, and appear without any solid support of reason or learning. After humbling our Kings into dependence and poverty, he gives them a prerogative that is without bounds. He seems now in conspiracy against the crown, and now against the people.

I have shown, in other places of this work, that the Kings of Scotland could not be so contemptible as he has represented them; and I controvert in this note the absolute power he would impute to them. The truth is oftener to be found in the middle than in extremities. It is to insult our Kings, to consider them as pageants.

It

‘ that the King mak *requeist* to certane of the greit burrowis of the land that ar of ony mycht to mak cartis of weir.’ *Black Acts*, fol. 38. These passages, as well as several others to which I have appealed in the course of this note, are shamefully omitted in the later editions of the statute-book.

It is to insult our nation, to consider them as despots. And, to expose them sometimes in the one view, and sometimes in the other, is to do something more than to sport with our history.

A propensity to embellish other men's notions, without considering enough on what authority they are founded, how strong they are in themselves, and what inferences are to be deduced from them, is a constant and a teeming source of mistake to this showy and elegant historian. It is thence that he holds out many a frail opinion to glitter and to perish. To collect these cannot be interesting to me. But, though I could not submit to make a chronicle of his errors, I have been induced to wipe away, and to dispel, in part, the stains and the gloom they would fix upon our story, and to illustrate, by examples, the respect which is due to his authority. And, while I perform this service to truth,

to

to liberty, and to our national antiquities, I disdain to be unjust, and am far from being insensible to the peculiarities of his merit.

It must be a pain, I know, to many of his readers, that the most widely amusing of all our writers, is not, at the same time, the best informed, and the most able. They must regret, that a work which forms so general, so easy, and so pleasing a pastime, is not also fraught with instruction, and loaded with wisdom. And, that the author, who is deservedly so eminent in all the arts of courtly and popular composition, is not likewise remarkable for those superior qualities, which alone can secure and establish admiration, the power of thought, and the originality of sentiment.

T H E E N D.

[Faint, illegible text visible through the paper, likely bleed-through from the reverse side. The text appears to be organized into several paragraphs.]

A P P E N D I X.

No. I. Page 156.

*Charter from Malcolm IV. to Walter the
Steward of Scotland*.*

MALCOLMUS, Rex Scotorum, episcopis, abbatibus, comitibus, baronibus, iustitiis, vicecomitibus, praepositis, ministris, cunctisque aliis probis hominibus, clericis et laicis, Francis et Anglis, Scotis et Galovidiensibus, totius terrae suae, tam praesentibus quam futuris, salutem: Notum sit omnibus quod priusquam arma suscepi, concessi, et hac mea carta confirma-

A a

vi

* From the collections of Sir James Balfour of Kin-
naird, ap. Crawford, Hist of the family of Stewart, p. 2.

vi haereditarie Waltero, filio Allani, Dapifero meo, et haeredibus suis in feodo et haereditate, feneschalliam meam, tenendam sibi et haeredibus suis, de me et haeredibus meis, ita bene et plenarie, sicut rex David feneschalliam suam ei dedit et concessit ; praeterea confirmo donationem illam, quam rex David, avus meus, ei dedit, scilicet de terris de Reinfrew, Paisleth, Pullock, Tulloch, Kerkert, Le Drip, Egilsham, Lochynoc et Innerwick, Inchenan, Hastenden, Legerwood et Brichenfyde, cum omnibus istarum terrarum pertinentiis ; et, in unoquoque burgo et dominio meo, unam plenariam toftam, et cum unaquoque tofta, viginti acras terrae, ad hospitia sibi in eo facienda ; quare volo ut idem Walterus, et haeredes sui teneant, in capite, omnia praenominata, tam illa, quae ipse habuit ex donatione regis David, quam illa, quae habuit ex mea donatione : Reddendo mihi et haeredibus meis, de illo feodo, servitium quinque militum. Apud castrum de Roxburgh

burgh in festo Sancti Johannis Baptistae,
anno regis nostri quinto. His testibus,

Ernesto episcop. St Andrae.

Herberto episc. de Glasgow.

Johanne abbate de Keleow.

Will. abbate de Melrofs.

Waltero, cancellario.

Willielmo et David fratribus regis.

Comite Cospatrick.

Comite Duncano.

Ricardo de Morvil.

Gilberto de Umphravail.

Roberto de Brufs.

Radolpho de Souls.

Philippo de Colvill.

Willielmo de Sumervilla.

Hugone Riddel.

Davide Olifard.

Waldeno, Filio comitis Cospatric.

Willielmo de Morvil.

Balduino de la Mar.

Liolpho, filio Macus,

No. II. Page 203.

An EXTRACT from DOMESDAY-BOOK.

*Terra Roberti de Stadford,**In Warendon Hundred.*

ROBERTUS de Stadford tenet in Stan-
tone 3 virgatas terrae, et Hugo de
eo. Terra est 3 carucatarum. In domi-
nio est una, et 3 servi, et 6 villani, et 5
bordarii, cum 2 carucatis. Ibi 3 acrae
prati, *valuit* 10 solidos, *modo* 30 solidos.
Aileva libere tenuit, tempore regis Ed-
wardi.

*Terra Roberti de Oilgi,**In Cailea Hundred.*

Robertus de Oilgi tenet 1 hidam, et 1
virgatam terrae in Wicha; et Rogerius de
co.

eo. Terra est 10 carucaturum. In dominio sunt 3 carucatae, et 7 servi, et 7 villani, et 3 bordarii, cum 4 carucatis. Ibi 10 acrae prati, filva ii quarentenis longa, et 6 quarentenis lata, *valuit* 40 solidos, *modo* 100 solidos. Azor libere tenuit, tempore regis Edwardi.

In Sutone Hundred.

Idem tenet de Roberto 1 hidam in Tewardre. Terra est 3 carucatarum et dimid. In dominio est una et 2 servi et 7 villani habent 2 carucatas et dimid. Ibi molinum de 30 denariis, *valuit* 10 solidos, *modo* 30 solidos.

Idem Robertus tenet dimid. hidam, et quintam partem 1 hidae in Prestone. Terra est 1 carucatae et dimid.

Terra

Terra Roberti de Vecy,

In Rodewelle Hundred.

Robertus de Vecy tenet 1 hidam in Baderbroc. Terra est 2 carucatarum; 1 est in dominio, et 4 bordarii habent aliam carucatam, *valuit* 5 solidos, *modo* 10 solidos. Ailric libere tenuit, tempore regis Edwardi. *Ap. Transcript of Doomsday-book, so far as it concerns Northamptonshire, in Morton's natural history of Northamptonshire, p. 26.*

No.

No. III. Page 287.

The Oath of a Knight.

I. **Y**E fall fortifie and defend the Christian religion, and Christ's holy evangell, presently publicly preached in this realm, at the uttermost of your power.

II. Ye sal be leyl and trew to our soverane Lord the King's Majestie, to all ordure of chivalrie, and to the noble office of arms.

III. Ye fall fortifie and defend justice at your power, and that without fear or favour to any partie.

IV. Ye fall never flie from your soverane Lord the King's Majestie, nor fra his hienes lieutenant in time of melle.

A a 4

V.

V. Ye fall defend your native cuntrie from all alienars and strangers.

VI. Ye fal defend the just action and queruelles of all ladies of honor, of all true and friendles widowes, orphelins, and maids of good fame.

VII. Ye fall do diligence quhaire ever ye hair thair are any murtherars, traytors or maisterfull thieves and ravaris that oppreſſeth his Majeſtes ledges and poore, to bring them to the lawes or juſtices with diligence at all your power.

VIII. Ye fall mainteine and uphold the whole eſtaites of chivalrie with horſe, harnes, and other knightly abviliaments, and fall help and ſuccor all thame of the ſamen ordure if they ſtand in need.

IX. Ye fall acquire and ſeek to have the knowledge and underſtanding of all the
articles

articles and points requisite for you to know, contained in the books of chevalrie.

X. Ye will promes to observe, keep, obey, and fulfill all the premisses to the uttermost of your power, so help you God, be your owen hand, and be God himself. *Ap. Selden, Titles of Honour, part ii. chap. vii. See also the works of Drummond of Hawthornden, p. 138.*

No. IV.

No. IV. Page 322.

Pro Duce Britanniae de Theolonio non Praestando.

REX universis et singulis, ad quos, &c. salutem. Querelam, carissimi fratris nostri Johannis Ducis Britanniae et Comititis Richemundiae recepimus, continentem quod, licet ipse et omnes homines et tenentes sui de comitatu Richemundiae quieti esse debeant, idemque comes, et omnes alii comites Richemundiae, et eorum homines et tenentes de comitatu praedicto a tempore cujus contrarii memoria non existit, semper haecenus quieti esse consueverant de theolonio, pontagio, muragio, pavagio, passagio, lastagio, stallagio, kaiagio, et picagio, de bonis suis praestandis, per totum regnum nostrum Angliae, idem tamen

men comes, ac homines et tenentes sui de comitatu praedicto, saepius, ante haec tempora, pro praestatione hujusmodi theolonii, pontagii, muragii, pavagii, passagii, lastagii, stallagii, kaiagii, et picagii infra regnum nostrum praedictum, de bonis et rebus suis districti fuerunt, et indies distringuntur minus juste, in ipsius comitis dampnum non modicum et gravamen, et status hominum et tenentium suorum praedictorum oppressionem manifestam, super quo idem comes nobis humiliter supplicavit ut sibi, ac hominibus et tenentibus suis praedictis, de remedio congruo providere velimus, nos nolentes ipsum comitem, aut homines et tenentes suos praedictos, indebiti onerari, vobis praecipimus quod, si praefatus comes ac homines et tenentes sui praedicti quieti esse debeant, idemque comes, et omnes alii comites praedicti ac eorum homines et tenentes de comitatu praedicto, a tempore praedicto semper haecenus quieti esse consueverint de hujusmodi theolonio, pontagio,

pontagio, muragio, pavagio, passagio, lastagio, stallagio, kaiagio, et picagio, de bonis suis praestandis, per totum regnum nostrum Angliae, ut praedictum est, tunc huiusmodi distractionibus eis de caetero inferendis, penitus desistentes, praefatum comitem, ac homines et tenentes suos praedictos, de huiusmodi theolonio, pontagio, muragio, pavagio, passagio, lastagio, stallagio, kaiagio, et picagio, vobis de bonis et rebus suis praestandis, quietos esse permittatis, prout inde quieti esse debeant, idemque comes et omnes alii comites praedicti, et eorum homines et tenentes de comitatu praedicto, a tempore praedicto semper hactenus rationabiliter quieti esse consueverunt.

Teste Rege apud Westmonasterium decimo octavo die Junii. *Et erat patens. Ap. Appendix to the Honour of Richmond, p. 198. 199.*

No. V. Page 329.

Carta foundationis Coenob. de Dunfermelinge.

IN nomine Sanctae Trinitatis, ego Malcolmus, Dei gratia, Scottorum Basileus, autoritate regia, ac potestate, Margeretae Reginae, uxoris meae, episcoporum, comitum, baronumque regni mei confirmatione, et testimonio, clero etiam, *adquiescenteque populo.* Sciant praesentes et futuri me fundasse Abbaciam in monte infirmorum, in honorem Dei Omnipotentis, et S. individuae Trinitatis, pro salute animae meae, et omnium antecessorum meorum, et pro salute animae Reginae Margaretae, uxoris meae, et omnium successorum meorum. Concessi etiam, et hac charta mea confirmavi, praedictae abbathiae omnes terras et villas

villas de Pardufin, Pitnaurcha, Pittecorthin, Petfactachin, Lavar, Bolgin, et shiram de Kircaladunt, et Inneresc minorem, cum tota schira de Fothriff, et Muffelburge, cum omnibus suis pertinentiis, tam in capellis et decimis, aliisque oblationibus, quam in omnibus aliis ad eas terras, villas, et schyras juste spectantibus, ita libere, sicut aliquis rex aliquas Elemosinas unquam dedit vel contulit, ab initio mundi, ad hanc diem: Testibus Ivo Kelledeorum Abbate, Mackduffe Comite, Duncano Comite, Araldo Comite, Neis filio Willielmi Merleswain, apud Edinburge. *Exscript. ab Autogr. per Jac. Balfoure Eq. Aurat. et baronem Lyon. ap. Monast. Anglican. vol. ii. p. 1054.*

No.

No. VI. Page 337.

Indenture between Robert I. and his Subjects.

HOC est transcriptum indenturae concordatae et affirmatae inter Dominum Robertum, Dei gratia, Regem Scottorum illustrem, et comites, barones, liberetenentes, communitates burgorum, ac universam communitatem totius regni, magno sigillo regni et sigillis magnatum et communitatum praedictorum alternatim figillatum in haec verba. Praesens indentura testatur, quod, quintodecimo mensis Julii, anno ab incarnatione Domini M. CCC. vicesimo sexto, tenente plenum parliamentum suum apud Cambuskenneth serenissimo Principe domino Roberto, Dei gratia, Rege Scottorum illustri, convenientibus ibidem comitibus,

bus, baronibus, burgenſibus et caeteris omnibus liberetenentibus regni ſui, propositum erat per eundem Dominum Regem, quod terrae et redditus, qui ad coronam suam antiquitus pertinere solebant, per diversas donationes et translationes, occasione guerrae factas, sic fuerant diminuti quod statui suo congruentem sustentationem non habuerit, absque intolerabili onere et gravamine plebis suae: Unde instanter petiit ab eisdem, quod cum tam in se, quam in suis, pro eorum omnium libertate recuperanda et salvanda, multa sustinuiſſet incommoda, placerit eis, ex sua debita gratitudine, modum et viam invenire per quem juxta status sui decentiam ad populi sui minus gravamen congrue posset sustentari. Qui omnes et singuli comites, barones, burgenſes, et liberetenentes, tam infra libertates quam extra, de Domino Rege, vel quibuscunque aliis dominis infra regnum, mediate vel immediate tenentes, cujuscunque fuerint conditionis, considerantes et fatentes praemissa
Domini

Domini Regis motiva esse vera, ac quamplura alia, suis temporibus, eis per eum commoda accrevisse, suamque petitionem esse rationabilem atque justam, habito super praemissis commune ac diligenti tractatu, unanimiter gratanter et benevole concesserunt et dederunt Domino suo Regi supradicto annuatim ad terminos Sancti Martini et Pentecostes, proportionaliter, pro toto tempore vitae dicti Regis, decimum denarium omnium firmarum et reddituum suorum, tam de terris suis dominicis et wardis, quam de caeteris terris suis quibuscunque infra libertates et extra, ex tam infra burgos quam extra, juxta antiquam extentam terrarum et reddituum tempore bonae memoriae Domini Alexandri, Dei gratia Regis Scottorum illustris ultimo defuncti, pro ministeriis ejus fideliter faciend. excepta tantummodo destructione guerra; in quo casu fiet decidentia de decimo denario praekoncesso, secundum quantitatem firmarum, quae occasione praedicta, de terris et redditibus praedictis, levare non poterint, pro-

ut per inquisitionem per vicecomitem loci fideliter faciendam poterit reperiri: Ita quod omnes hujusmodi denarii, in usum et utilitatem dicti Domini Regis, sine remissione quacunque, cuicunque facienda, totaliter committantur: Et si donationem vel remissionem fecerit de hujusmodi denariis antequam in Cameram Regis deferantur et plenarie persolvantur, praesens concessio nulla sit, sed omni careat robore firmitatis. Et quia quidem magnates regni tales vendicant libertates, quod ministri Regis infra terras suas ministrare non poterint, per quod solutio Domino Regi facienda forsan poterit retardari: Omnes et singuli hujusmodi libertates vendicantes, Domino Regi manuceperunt, portiones ipsos et tenentes suos et contingentes, per ministros suos, ministris Regis, statutis terminis plene facere persolvi: Quod si non fecerint, vicecomites Regis quilibet in suo vicecomitatu, tenementa hujusmodi libertatum, regia auctoritate, per hujusmodi solutione faciendam distringant.

distringant. Dominus vero Rex, gratitudinem et benevolentiam populi sui placide ponderans et attendens, eisdem gratiose concessit, quod a festo Sancti Martini proximo futuro, primo viz. termino solutionis faciendae, collectas aliquas non imponet, prisas seu cariagia non capiet, nisi itinerando seu transeundo per regnum, more predecessoris sui Alexandri regis supra dicti: Pro quibus prisas et cariagiis plena fiat solutio super unguem: Et quod omnes grossae providentiae Regis cum earum cariagiis, fiant totaliter sine prisas. Et quod ministri Regis, pro omnibus rebus ad huiusmodi grossas providentias faciendas, secundum commune fore patriae, in manu solvant sine dilatione. Caeterum consensum est et concordatum, inter Dominum Regem et communitatem regni sui, quod, ipso Rege mortuo, statim cessit concessio decimi denarii supradicti. Ita tamen quod de terminis praeteritis ante mortem ipsius Domini Regis plenarie satisfiat. Et quod
nec

nec per praemissa, vel aliquod praemissorum, post hujusmodi concessionem finitam, haeredibus dicti Domini Regis, aut communitati regni sui aliquatenus fiat praejudicium, sed quod omnia in eundem statum redeant et permaneant, in quo erant ante diem praesentis concessionis. In quorum omnium testimonium, uni parti hujus indenturae, penes dictos comites, barones, burgenses, et liberetenentes residenti, appositum est commune sigillum regni: Alteri vero parti, penes Dominum Regem remanenti, sigillo comitum, baronum, et aliorum majorum liberetenentium, una cum communibus sigillis burgorum regni, nomine suo et totius communitatis concorderunt sunt appensa. Dat. die, anno et loco supradictis. Et hoc transcriptum penes magnates et communitates praedictos et eorum successores, remansurum, sigillo regni consignatur, in testimonium et memoriam futurorum. Datum apud Edinburgum, in parlamento Domini Regis tento ibidem,

dem, secunda Dominica quadragesimae, cum continuatione dierum sequentium, anno gratiae M. CCC. vicesimo septimo. *From the Collections in the library of the Advocates at Edinburgh, ap. Historical Law Tracts.*

No.

No. VII. Page 341.

The Ordination or statute made at Scone, on the 4th day of April, in the Third year of Robert II.

IN Dei nomine, Amen, anno ab incarnatione ejusdem millesimo trecentesimo septuagesimo tertio, et regni regis Roberti Secundi anno tertio, mensis Aprilis die quarto, praefatus rex Robertus Secundus in parlamento suo apud Sconam, ac cupiens incertitudinem successionis in plerisque regnis, et partibus contingentem retroactis temporibus vitare pro posse, et ei pro se et suis maxime futuris temporibus obviare, ex deliberato consilio et cum consensu et assensu praelatorum comitum et baronum, ceterorumque procerum et nobilium, ac omnium aliorum, de tribus statibus sive communitatibus

nitatibus totius regni congregatorum ibidem, declaravit, ordinavit, et statuit, quod filii ipsius regis ex sua prima et secunda uxoribus nunc geniti, et eorum heredes, successive succedent ipsi regi in regnum, et in jus regnandi per modum infra scriptum, et sub forma, et conditionibus infra scriptis. Videlicet, quod dominus Johannes primogenitus ipsius regis comes de Carricke ac seneschallus Scotiae pro cuius successione jure in parlamento immediate praecedenti plene fuerat declaratum et heredes sui post mortem ipsius sibi in regnum, et in jus regnandi succedent, ac ipsis domino Johane et heredibus deficientibus forsitan, quod absit, dominus Robertus comes de Fife, et de Monteith filius ipsius domini regis ex prima uxore secundogenitus et haeredes sui in regnum et in jus regnandi successive et immediate succedent, et ipsis domino Roberto, et haeredibus suis hujusmodi, deficientibus etiam fortasse, quod absit, dominus Alexander dominus de Badenoch
filius

filius ipsius domini regis ex eadem uxore tertio genitus, et heredes sui tantum in regnum, et in jus regnandi; post mortem ipsorum simili modo successive et immediate succedent; ipsis vero domino Alexandro et heredibus suis praefatis, similiter forsitan quod absit, deficientibus, dominus David comes de Strathern filius ipsius domini regis ex secunda uxore genitus, et haeredes sui eisdem sic deficientibus, ex toto integrum et in jus regnandi similiter successive et immediate succedent; ipso vero David et haeredibus suis predictis similiter forte deficientibus, Walterus filius ipsius domini regis frater germanus ipsius domini David et haeredes ipsius in regnum et in jus regni simili modo succedent. Praedictis autem quinq; fratribus et eorum haeredibus ab ipsis descendantibus deficientibus forsitan similiter et ex toto, quod absit, veri et legitimi haeredes de sanguine et parentela regali, ex tunc in regnum et in jus regnandi succedent. Quibus sic statutis, ordinatis,

tis, declaratis, et actis, omnes prelati comites et barones ac omnes de tribus statibus five comunitatibus totius regni in ipso parlamento ibidem propter haec et alia congregati, prefatas declarationem, ordinationem, et statutum, ratificaverunt et approbaverunt pro se et suis haeredibus perpetuis et futuris temporibus duraturis. Et nihilominus infra-scripti videlicet praelati domini Willielmus Sancti Andreae, Michael Dunkelden; Alexander Aberdonen; Patricius Brechanen; Alexander Muravien; Andreas Dumblanen; Alexander Rossen; et Malcolmus Catenen; Ecclesiarum episcopi praesentibus, et apertis sacrosanctis Dei evangeliiis, ac infra-scripti comites, barones et nobiles, primo videlicet ipsi filii regis seniores, et provectae aetatis domini, scilicet Johanes Robertus, Alexander, necnon Dominus Willielmus de Douglass, Georgius de Dunbar Marchiae, Johanes de Dunbar Moraviae, comites Thomas de Haya constabularius Scotiae, Dominus Williel-

mus de Keith marescallus Scotiae, Jacobus de Lindsey, Dominus de Crawford, Archibaldus de Douglas dominus Galvidiae, Jacobus Douglas dominus de Dalkeith, Robertus de Erskine, Hugo de Eglintonne, Duncanus de Wallays, David de Graham, Walterus de Halyburtonne, Willielmus de Dishingtonne, Alanus de Erskin, Alanus de Jacobus de Frazer, Alexander Frazer, Robertus fenechallus de Innermaith, Rogerus de Mortuo Mari, David filius Walteri, Patricius de Grahame, Andreas de Vallibus, Johanes Wallays, Johanes Maxwell, Andreas Campbell, Willielmus de Cunningham filius, et Johanes Strachawhin milites, Johanes Kennedy, et Alexander de Cockburn, scutiferi, eisdem sacrosanctis evangeliiis, et eorum quilibet manu-tactis corporaliter juraverunt, quod prefatas declarationes, ordinationes, et statuta pro se et pro eorum haeredibus inviolabiliter observabunt et ab aliis pro viribus perpetuo facient observari. Consequenter vero et immediate,

ate, tota multitudine cleri et populi in ecclesia de Scona ante magnum altare propter hoc specialiter convocata, ac prefata declaratione, ordinatione, et statuto sic juratis alta et publica voce, eis expositis, quilibet levata manu per modum fidei-dationis in signum universalis consensus totius cleri et populi exprimebat et manifestabat publice suum consensum pariter et assensum. In quorum omnium testimonium prefatus dominus rex presenti scripto sive instrumento, suum magnum precepit apponi sigillum, et ad majorem evidentiam, et securitatem pleniorum, omnes episcopi, comites, barones, et nobiles supradicti eidem instrumento sua sigilla fecerunt apponi, gratia testimonii et ad perpetuam memoriam futurorum: Acta fuerunt haec apud Sconam in pleno parlamento domini regis, predictis anno, mense, et die superius annotatis. *Ap. Brady, Tracts concerning the old English history, Appendix, p. 46. 47.*

